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**VOL. 84 NEW YORK  
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# REPORTS OF CASES

DECIDED IN THE

## COURT OF APPEALS

OF THE

84

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS HANDED DOWN FEBRUARY 1, 1881,  
TO THE DECISIONS OF APRIL 19, 1881.

WITH

NOTES, REFERENCES AND INDEX.

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BY H. E. SICKELS,

STATE REPORTER.

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VOL. XXXIX.

ALBANY:

WEED, PARSONS & CO., CONTRACTORS.

1881.

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LO

## JUDGES OF THE COURT OF APPEALS.

---

CHARLES J. FOLGER,\* CHIEF JUDGE.

CHARLES ANDREWS,† CHIEF JUDGE.

CHARLES A. RAPALLO,

THEODORE MILLER,

ROBERT EARL,

GEORGE F. DANFORTH,

FRANCIS M. FINCH,

ASSOCIATE JUDGES.

---

\* Resigned November 14, 1881.

† Appointed November 19, 1881, *vice* Charles J. Folger, resigned.

*To the Honorable*

CHARLES J. FOLGER:

DEAR SIR—We cannot allow the occasion of your retirement from the bench to pass, without expressing our sense of the great loss which the Court sustains by the event, and the regret we individually feel at the breaking up of the intimate official relations which have existed between us. This is not the proper occasion to speak at large of your judicial labors. The forty volumes of New York Reports, which have been issued since your accession to the bench, testify to your faithfulness and learning. The questions which come before the Court of last resort in this State, have a wide range, involving the consideration and application of legal principles pertaining to nearly every branch of jurisprudence. It is not flattery to say that your opinions, in our judgment, are second to none, as clear, learned, and able discussions of the questions considered.

We have come to know and admire your firmness, independence, and unswerving devotion to duty. We shall cherish the recollection of the friendship which has grown up between us, as between members of one household, and our best wishes attend you, in the new and important service, to which you have been called. With great respect, we are

Your friends and associates,

CHAS. ANDREWS,  
CHARLES A. RAPALLO,  
THEODORE MILLER,  
ROBERT EARL,  
GEO. F. DANFORTH,  
F. M. FINCH.

ALBANY, Nov. 10, 1881.



WASHINGTON, D. C., *November 14, 1881.*

MY BRETHREN — for so I will call you, yet awhile. Your note of the 10th instant touches me deeply. Its words of praise I will ever prize; for I know you so well, as to know that you are not apt to take the names of things in vain. Besides that, I may say to each of you the verse long ago spoken:

*“Lætor nam, laudari me abs te, pater, laudato viro.”*

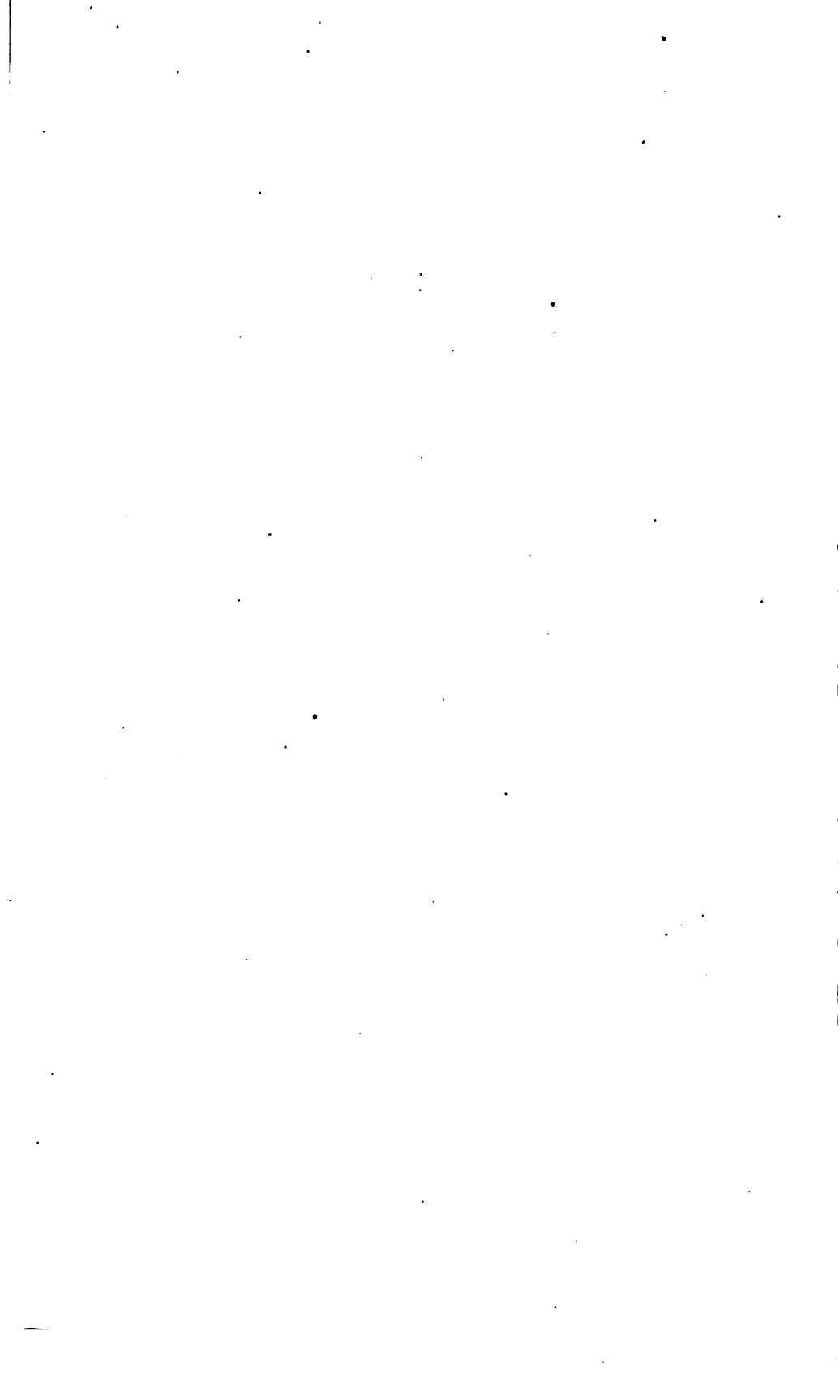
“The forty volumes of New York Reports;” they do indeed testify (I may say it now), to an unremitting judicial labor that has seldom been outstripped; and the sad memorials that appear in four of them, tell too, how often vigor of body yielded under strain of mind. The many opinions of all the seven are there, as finished, they left their hands. But as no one may know, by looking on a work of art, the manifold deft touches that brought it to completeness, so no one can tell the thought, the care, the toilsome passage through perplexities, the laborious search for precedents, the doubt, the deliberation, the conference with fellows, the nice poising of reasons, that lead up to the laconic, yet weighty conclusions, “judgment should be affirmed” or “judgment should be reversed.”

But the dearest of my recollections of the Court of Appeals will be of the harmony of intercourse, the uniform courtesy, the mutual confidence, the unvarying respect for one another, the cordial appreciation, the brotherly love, that held us in happy, personal and official relations. When I reflect on all these things, I wonder almost to sobbing, that I could have been led to give up the place of formal Head of such a Court, the nominal Chief of such a body of Judges.

My Brethren, I thank you for your words of praise and affection, and subscribe myself,

Sincerely your friend,

CHAS. J. FOLGER.



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CASES DECIDED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW YORK,

COMMENCING FEBRUARY 1, 1881.

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In the Matter of the Claim of WILLIAM H. FLANDROW, an  
alleged creditor of TUNIS VAN BRUNT.

An attorney for the successful party in an action by whom a judgment was procured is not an "individual holding such property" within the meaning of the provision of the Code of Procedure (§ 235), authorizing the execution of an attachment by service of a copy.

Accordingly, *held*, where a judgment in favor of an attachment debtor was attempted to be attached by service of a copy of the warrant upon one of the attorneys for said debtor, in the action wherein said judgment was rendered, that the attachment was not properly executed; and that a purchaser at sheriff's sale under execution and order of the court in the attachment suit acquired no title.

*It seems* that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor.

(Submitted January 20, 1881; decided February 1, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 6, 1880, affirming an order of the surrogate of the county of New York, denying the application of the petitioner above named, for the payment of his alleged claim against the estate of said Tunis Van Brunt, deceased. (Reported below, 20 Hun, 36.)

The nature of the claim and the material facts appear in the opinion.

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*Abbott Brothers* for appellant. The judgment comes within the meaning of the phrase "other property incapable of manual delivery," in section 235 of the old Code. (Old Code, §§ 231, 462, 463, 464; *O'Brien v. Mechanics and Traders' Ins. Co.*, 56 N. Y. 56; *Clark v. Goodrich*, 41 id. 210.) The attorney of the judgment creditor comes within the meaning of the phrase "individual holding," in section 235 of the old Code. (3 R. S. 362, §§ 25, 20, 22; or, see *Banks & Bros.* [6th ed.] R. S. 620, §§ 22, 24, 25; *Stewart v. Beddlearum*, 2 N. Y. 103, 106.) Such attorney is authorized by his retainer to institute proceedings supplementary to execution. (*Ward v. Roy*, 69 N. Y. 96.) After obtaining judgment for his client, he continues to be his agent in the collection of the money. (*McDonald v. Todd*, 1 Grant's [Penn.] Cas. 17.)

*John E. Burrill* for respondent. The attorney's authority ceased on the entry of judgment, and he did not hold it in any sense, and notice to him of the attachment was not sufficient. (*Walradt v. Maynard*, 3 Barb. 584; *Mandeville v. Reynolds*, 68 N. Y. 578.) If the judgment debt was not levied on under the attachment, the attempted sale under the execution was a nullity, and the order of the court authorizing such sale was without jurisdiction. (Old Code of 1871, §§ 237, 286, 291.) The claim of Flandrow being disputed, the surrogate had no jurisdiction to hear and determine its validity. (*Tucker v. Tucker*, 4 Keyes, 136; *Cooper v. Felter*, 6 Lans. 485.) The court had no power to order payment, or partial payment, of petitioner's claim by the special administrator, because the debts owing by the deceased exceeded, in the aggregate, the amount of the assets of his estate. (Laws of 1870, chap. 359.)

DANFORTH, J. Prior to the 1st day of March, 1867, the Marine Bank of Chicago, by Jernegan, Smith & Baldwin, its attorneys, commenced an action, in the Supreme Court of this State, against Tunis Van Brunt, upon certain promises in writing made by him, and on that day recovered judgment for the sum of \$6,858.12, and the same was duly docketed in the office

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of the clerk of the city and county of New York. Van Brunt died, and pending a contest relative to the proof of his will, special letters of administration were issued to Mr. Schell, the respondent herein. The Marine Bank was a foreign corporation, and on the 20th day of January, 1869, one Hammond commenced an action against it as such in the Supreme Court of this State for the recovery of money. The summons and complaint therein were served by publication, and a warrant of attachment issued against its property to the sheriff of New York city and county. A return was made by him showing the execution of the attachment upon the judgment above described, "by leaving a certified copy of the said warrant of attachment with J. L. Jernegan, the individual holding such judgment as plaintiff's attorney, with a notice showing the property levied upon." Judgment by default was subsequently entered, execution issued, and an order obtained directing the sale of the judgment recovered by the Marine Bank against Van Brunt. Upon the sale made in pursuance of this order, Hammond became the purchaser of the judgment, and through several mesne assignments the title passed, as it is claimed, to the above-named Flandrow. The special administrator refused to pay it, and thereupon Flandrow presented a petition to the surrogate of the city and county of New York, whereby he asked for an order or decree of payment. It was opposed by Mr. Schell and relief denied by the surrogate, upon the ground the attachment was not properly served, and, therefore, no title to the judgment was acquired by the petitioner. The order of the surrogate was affirmed by the General Term of the Supreme Court, and although upon this appeal the respondent relies upon several grounds for its support, it is only necessary to consider the one above referred to, viz.: that no legal service of the attachment was made.

It was provided by section 235 of the Code of Procedure, then in force, that "the execution of the attachment upon \* \* \* any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment \* \* \* with the debtor, or individual

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holding such property \* \* \* \* ." It, of course, cannot be doubted that a judgment is, within the meaning of the Code, property subject to attachment, and of the kind incapable of manual delivery. It is an award of the court that the plaintiff recover a sum of money ; and thereby a legal obligation arises on the part of the defendant to pay it. But although it is said to be a contract or debt, or obligation of record, it cannot be said to be held or to be in the possession of any one. The clerk, as an officer of the court, keeps the record, but does not "hold" the judgment. Nor does the attorney by whom it was procured. His powers are only such as are prescribed by law. They are limited to a representation of the plaintiff in the action, the management of the controversy therein ; to the collection of the judgment when recovered, by such means as the law provides, and its discharge or satisfaction, if paid within two years from its recovery. He can neither assign nor sell nor deliver it. He uses the process of the court for the enforcement of the judgment, and if found in his hands, its proceeds might be seized by attachment. But the judgment is intangible. As the attorney has not possession of it, neither has he, in any general sense, "authority over" it. His power is official, its exercise limited to those acts which by means of legal process lead to its enforcement, or to the receipt of payment within a time limited by statute. His retainer is evidence that he may exercise the powers so given, but they cannot be extended or enlarged without his client's consent. And what he cannot himself do cannot be done through him by his client's creditor.

From these considerations and from the very nature of the obligation it follows, that the only way to subject a judgment to attachment for the payment of a debt of the plaintiff therein is to serve the warrant upon the debtor, the person against whom the judgment was recovered ; and as that was not done, the petitioner acquired no title to the judgment, and the order denying his petition was properly made. It should be affirmed with costs.

All concur.

Order affirmed.

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Statement of case.

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*LOUIS BILLS, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.*

Plaintiff's cattle were transported by defendant from B. to W. A. under a contract which provided, among other things, that in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff should load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle being without food were injured. In an action to recover damages for the injury, *held*, that defendant was not bound to unload the cattle when the train was stopped; but that it was its duty, upon reasonable request, to so place the cars in which the cattle were as to be convenient to the usual and accessible means of unloading, if practicable, and for a failure so to do it was liable.

Plaintiff's agent made such a request; the engine drawing the train was disabled; it appeared, however, that defendant had engines at U., forty-three miles distant; also that other motive power might have been readily obtained. The court, after referring to the evidence on this subject and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance if help could readily have been obtained. *Held*, no error; and that this was so, even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. The engine of the train was disabled by the engineer running it into the water, and there was evidence tending to show negligence on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload was not to be excused by an absence of motive power. *Held*, no error; that defendant could not plead its own previous negligence as an excuse for its inability to perform a distinct and affirmative duty.

Also, *held*, that plaintiff's damages could not be mitigated by speculating upon what might have happened had his request been granted and the cattle unloaded.

When the train was at U., and those on board were warned of the high water; plaintiff's agent requested the conductor to place the cars there in a convenient position for unloading; this request was declined. The court was asked but declined to charge that defendant was not liable for such refusal; it charged, however, that if the jury believed the conductor had reason to think he could run the train through without serious detention, defendant would not be liable because of such refusal. *Held*, no error.

(Argued January 20, 1881; decided February 1, 1881.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff, entered upon an order made April 8, 1880, overruling defendant's exceptions, which were ordered to be heard at first instance at General Term and directing judgment on the verdict.

This action was brought to recover damages for alleged negligence of the defendant in the performance of a contract as a common carrier for the transportation of eight car-loads of cattle. A memorandum of decision on former appeal will be found in 53 N. Y. 608.

The plaintiff's cattle were transported by the defendant from Buffalo to West Albany, under a special contract, which provided, among other things, that in consideration of a reduced price for transportation the plaintiff should assume certain risks, and among others, those of injuries which the cattle might receive in consequence of their maiming themselves or each other, or from delays, or on account of being injured, and also the risk of any loss or damage which might be sustained by reason of any delay in the transportation.

It was further stipulated that the plaintiff should load, transship and unload the cattle at his own risk, the defendant furnishing the necessary laborers to assist, and also that the plaintiff should send some person on the same train with the stock, to take charge of it, who should be carried free of charge.

The time ordinarily consumed in the transportation from Buffalo to West Albany was from twenty-four to twenty-six hours. The train in question left Buffalo on Monday, March 16, 1868, at about 10 A. M., but by reason of an extraordinary flood the defendant's track was submerged at Palatine Bridge, fifty-four miles west of Albany and forty-three miles east of Utica; by this obstruction the train was delayed at Palatine Bridge about twenty-four hours, and did not arrive at Albany until the afternoon of Wednesday, the 18th of March. During all this time the cattle had remained upon the train, without food, and on their arrival at Albany, were found to have been seriously injured by the detention.

The evidence on the part of the plaintiff tended to establish



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that after the train had arrived at Palatine Bridge, and it had been ascertained that it could proceed no further, the agent of the plaintiff in charge of the cattle requested those in charge of the train to haul it on a side track, where there was a platform, for the purpose of enabling him to remove the cattle from the cars, and feed and water them, but that this request was refused.

The further material facts appear in the opinion.

*Samuel Hand* for appellant. Defendant was not obliged to unload the cattle at any place except that contemplated in the contract. (*Penn v. B. & E. R. Co.*, 49 N. Y. 204.) The whole injury being from delay, and it being expressly stipulated that damage from delay should be at the risk of the plaintiff, defendant was not liable. (*Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61; *Wibert v. Erie*, 2 Kern. 245; *Conger v. H. R. R. Co.*, 6 Duer, 375.) A carrier of cattle is not an insurer of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. (*Penn v. Buffalo & E. R. R. Co.*, 49 N. Y. 204; *Clark v. Rochester & Syracuse R. R. Co.*, 14 id. 570; *Michigan S. & N. J. R. R. Co. v. McDonough*, 21 Mich. 165; *Kendal v. Southwest Ry*, L. Rep., Exch. 373; Angell on Carriers, § 214a; *McManus v. Lancashire & York Ry Co.*, 2 H. & N. 693; *Carr v. Ry Co.*, 7 Exch. 711, B. PARKE; *Blower v. The Gt. W. Ryway*, L. Rep., 7 C. P. 655.) The contract was fully performed by defendant. (*Penn v. Erie R. R.*, *supra*; *Farrar v. Camden & Amboy R. R. Co.*, 55 Penn. St. 211; *Dow v. N. J. S. Nav. Co.*, 1 Kern. 485; *N. J. Steam Nav. Co. v. Merchants' Bk.*, 6 How. [U. S.] 344.)

*Hamilton Harris* for respondent.

FINCH, J. On a former appeal\* we held in this case that the defendant was not bound to unload the cattle, when the train was stopped near Palatine Bridge by the overflow of the Mohawk, and could not be made liable for such omission or re-

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\* See mem. 53 N. Y. 608.

fusal. But we also held that it was the duty of the defendant's agents in charge of the train, upon reasonable request, to so place the cars loaded with plaintiff's cattle as to be convenient to the usual and accessible means of unloading, if that was practicable, and that a failure to do so carried with it a liability for resultant damages.

The case was tried the second time upon this latter theory, and the one question of fact, litigated and submitted to the jury, was whether the conductor of the freight train unreasonably refused to place the cars containing plaintiff's cattle convenient to the chute or platform necessary to the work of unloading them, when it was entirely practicable so to have done. The verdict of the jury in plaintiff's favor must be held to have determined this issue in accordance with his version of the transaction and to dictate the facts which are controlling in the case.

The errors complained of on the part of the appellant are based upon the manner in which the case was submitted to the jury, and are raised by exceptions to the charge, and to refusals to charge as requested.

The first error alleged is that the judge charged substantially that the jury might find the defendant liable for gross negligence for refusing to send to Utica, forty-three miles away, for engines to move the cars, so that plaintiff might unload. This is a broader statement of the charge than is warranted by its terms. What the court did say should be taken together and in its natural connection. The judge said, "the next question is, could the request, if made, have been granted by defendant; did it have the motive power there? Ernest Bills declares it had; the conductor says it had not, and also testifies that he did not telegraph to Utica, where defendant had several engines. I leave it as a question of fact for you to decide whether it was not gross negligence in the company to omit to send for assistance when such help could readily have been obtained." This was not at all an instruction as matter of law that it was negligence not to send to Utica for help. The presence of engines there was only one of the elements involved in the question submitted. What the court did charge was that "if help

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could readily have been obtained" the jury might find the fact of negligence from the omission to send for it. There was very much of evidence tending to show that help was near and could be readily obtained. According to the statements of plaintiff's witnesses the work engine which did come to their relief was passed by the freight train at St. Johnsville, a few miles away. That engine did draw back the cars, from the flood to the station at Palatine Bridge. It is not easy to see why, if it could do that, it could not also do the further work of placing the cattle cars alongside of the shute or platform. There is some evidence that it became disabled; when, we do not know. There is no proof that it happened before plaintiff's request or its frequent repetitions. When first made the engine was evidently in working condition. And it is significant, that when last made, at about 8 o'clock in the evening, the refusal of the conductor is grounded, not on any alleged disability of the work engine, but solely on the ground that the men were all tired out. If all the motive power at hand was then in fact disabled, it is very strange that the fact was not stated, and that a much less cogent reason was assigned for the refusal. It further appears that at some time during the day a train came from Fonda with three or four engines. There were, therefore, facts indicating that motive power might have been readily obtained, if only sought for, and that without sending so far away as Utica. The question of negligence was left to the jury on all these facts, and with no stronger instruction than that help should have been sought if it could have been readily obtained. But if the natural and fair import of the charge was that the jury might determine, from all the facts before them, that it was negligence not to send for assistance to Utica, we still think the charge was not objectionable. If, as the defendant claimed, and as was broadly asserted at the argument, there was no motive power present, competent to move the train, when plaintiff's agent requested opportunity to unload, it must follow that the nearest help was at Utica. We cannot say as matter of law that the defendant's agents were not bound to send for the nearest help in the emergency, even if it was forty

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miles away. The question of negligence, under the circumstances, was one of fact. We may have an opinion about it, but it is the judgment of the jury which controls. If, as was said on the argument, we ought not to lay it down, as a rule of law, that it was negligence not to send to Utica for engines, neither, on the other hand, ought we to say, as matter of law, that it was not negligence to omit the effort, in the unforeseen emergency which had arisen, and under the circumstances established. The importance of not invading the province of the jury in actions of this nature was well stated in *Willis v. Long Island R. R. Co.* (34 N. Y. 679). It was said that on the trial of such an issue, if there is any doubt, however slight, either as to what facts are established by the testimony, or as to the conclusion in respect to the fact of negligence that may be drawn legitimately from the circumstances proved, by the average of men of common sense, ordinary experience, and fair intentions, the case should not be taken from the jury. If there was no help nearer than Utica, to say that the conductor was not bound to send for it, is to measure in miles, and by distance, as matter of law, the duty of the defendant. If forty-three miles is too far, how many miles shall the law determine as the range within which he ought to seek help? To say that he was not bound to send to Utica for assistance because it was forty-three miles away is to say that he could leave these cattle to starve without an effort, if no help was nearer. The call for help would take but minutes. Two or three hours, perhaps, would have brought it, at an expenditure to the company, altogether trifling compared with its possible liability for the injury threatened. An unforeseen emergency had arisen, one not provided for by the ordinary facilities and routine. What could be reasonably done to ward off the evil should have been done, and if nothing could be done except to send to Utica for an engine, because there was no motive power nearer, obtainable or likely to be obtained within a reasonable time, the question of duty, under all the circumstances of the case, was very clearly one for the good sense and judgment of the jury and not a question of law for the court. We do not, therefore,

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appreciate the alleged error of the charge. We think it fairly and correctly presented the question of negligence, in not sending for motive power which could be readily obtained, to the consideration of the jury.

The next exception argued was taken to the following language of the charge, viz.: "If the engine was disabled by the express negligence and recklessness of the defendant's agents, then their refusal to place the cars where plaintiff could have unloaded them, if such refusal was made, was not to be excused by an absence of motive power to comply with the request." The criticism at the bar upon this proposition is that there was no evidence of negligence in running the train into the water; that it was the duty of the conductor to proceed to his destination, if possible; and, as other engines, with lower fire-boxes, had succeeded in passing the flood, it was his duty to make the attempt. This argument is very just and forcible, and doubtless was urged to the jury as a reason why they should draw a conclusion in accordance with it. It may be, however, that they did not, and hence it is necessary to see if there was any evidence from which an inference of negligence was possible. All the facts of the flood were before the jury. News of the danger in advance reached this freight train at Utica and alarmed the plaintiff's agent, and caused a long delay at that point for information or orders. When the train reached Palatine Bridge it found the inundation. This was caused by an ice gorge at a narrow point of the river which set the water back over the adjoining lands. The water, at the station, was already one foot over the rails and rapidly rising. The conductor knew that until the ice gorge gave way the water must continue to rise. He knew, too, from the experience of former occasions, that the high water was likely to be brief, and if he waited the breaking up of the dam the danger would swiftly abate. Instead of waiting he chose to plunge into the flood and risk the chances. He knew the track before him, and that there were points where it sagged or was depressed, and that in such a basin the water would be necessarily deeper. He, therefore, ventured an experiment. He took the risk of just

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what happened. The water deepened but he persisted. As the danger increased it was possible to retreat. He chose to push on and take the chances. When he reached the sag the water mastered his fires and left the train helpless. It is impossible to say that in all this there was no evidence of negligence. The question is not what our judgment would have been, but whether the facts admitted of an inference that the engine was disabled by negligence. We think they do tend to establish it, at least so far as to raise a question of fact for the jury. But a graver suggestion is that the act of alleged negligence occurred before the request, and that indirectly the negligent delay, claimed to be excused by the contract and not made a ground of recovery, became available to the plaintiff. We must not forget the manner in which the question arose. We had decided in this same case, in distinct terms, that "in the unforeseen contingency which had arisen, it was the duty of the defendant's servants, who had the entire control of the motive power, to comply, if practicable, with the reasonable request of the plaintiff's agent, to place the train in the position which was necessary to enable him to save the property under his care from destruction." That was the duty imposed. The reasonable request was made and it was refused. One ground on which the refusal was sought to be justified was that there was no other motive power present except the train engine and that was disabled by the water. The validity of that excuse was denied by the court if the engine was so disabled by negligently and recklessly running it into the flood. That was only saying that the defendant should not plead its own previous negligence as an excuse for the inability to perform a distinct and affirmative duty. It did not give the plaintiff any benefit from defendant's negligent delay, but merely prevented the latter from having the benefit of it as an excuse. Does one who knows he may have a duty to perform escape its obligation by willfully or negligently incapacitating himself beforehand from performing it? It was the train-master's duty, if likely to be delayed by the flood, to place these cars where the cattle could be fed and watered. He could have

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done that before he ran into the water. He knew if his experiment failed he would be unable to move the cars with the engine at his command. He negligently took the risk. The evil happened. He could not move the cars when the necessity arose, and the fault was his own. To sustain as an excuse his inability to do a duty imposed by the emergency, which inability grew out of his precedent negligence, is to allow him to take advantage of his own wrong. If, when the necessity arose, the disability of his train engine had occurred without his fault and no other was at hand, a different case would have been presented. Occurring by his fault, the duty of procuring other motive power to take the place of that negligently disabled became pressing; the demand for it more just and equitable; the extent of inconvenience to warrant a refusal much greater and more serious. We think, therefore, the court did not err in submitting this question to the jury, and that the exception taken was not well founded.

Upon the question of damages two requests to charge were made and refused which may be considered together, as involving substantially the same inquiry. One was that if the jury believed it was unsafe to unload the cattle at Palatine Bridge the plaintiff could not recover on account of the conductor's refusal; and the other was, that if the jury thought the cattle would have been injured by taking them through the water, that could be considered on the question of damages. The difficulty underlying both requests is that the possibility of injury to the cattle from unloading them at Palatine Bridge was matter of pure surmise and speculation. There was no evidence which made such an injury even probable. Some accident might have happened; the supposition of the defendant's counsel that some of the cattle might have been drowned may be admitted as a possibility; but the damages which the plaintiff actually did sustain cannot be mitigated by speculating upon what might have happened if a request refused had been granted. Its refusal rendered damage to the cattle certain. That injury the plaintiff had the right to seek to avoid. He could take the risk of unloading. The act would be his. He

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only would be responsible for the consequences. The defendant cannot refuse him this opportunity, and claim to be released from the damages which actually did result, upon what is necessarily a mere guess or surmise that damages would have followed the unloading. No duty or obligation of the contract of the carrier would have been violated by permitting the plaintiff to unload. It would be his act, and not that of the defendant, and he could not be heard to complain of the granting of his own request, or of the consequences of his own act.

A further question was raised upon the facts which occurred at Utica. The plaintiff's agent there requested the conductor to place his cars in a convenient position for unloading, which request was refused. With reference to that transaction the court was asked to charge that the defendant was not liable for any alleged failure or refusal to leave the cars containing the plaintiff's cattle at Utica. The court declined to charge in that form, but left it to the jury to say whether it was reasonable to make the request at Utica, and that the defendant was bound to grant the request so far as to haul the cars where plaintiff could unload them, if there was good reason to believe there was danger in going on. And in that connection the learned judge further charged, upon the request of defendant's counsel, that if the jury should believe that the conductor of the train, when at Utica, had reason to believe that he could run the train through to West Albany without serious detention, then the company would not be liable by reason of a refusal to leave the cars containing plaintiff's cattle at Utica, or to permit the plaintiff to unload the cattle there. These two instructions of the charge were sufficiently favorable to the defendant, and were entirely correct. Taken together they left it to the jury to find negligence in the refusal at Utica only in the event that the conductor had not reason to believe that he could successfully run the train through the high water of which he had been warned. If he had no such reason then his refusal to allow the cattle to be unloaded at Utica, and to



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insist upon running them into danger would certainly be negligence. The charge was not erroneous in this respect.

An objection is taken that as to three of the cars no request was made, and damages to the cattle conveyed in them ought not to have been recovered. No trace of this objection appears in the history of the trial. No such question was there raised. It appears here for the first time, and is in truth only a criticism upon the language of the witnesses. The case was tried and disposed of on the assumption that the request related to all the cars. A suggestion at the trial that it did not would have directed attention to the point and enabled the plaintiff to put it beyond question if he did not acknowledge its truth. The language of the witness did at first relate to the five cars, but afterward covered them generally. He had a dispatch from the owner to unload the cattle and told the conductor so. The latter was in no sense or respect misled as to what was requested, and we cannot now permit the question to be raised.

The final objection argued is that the whole injury was from delay, and that was released by the contract under which the cattle were shipped. But that is not the view taken by us on the previous appeal, or justified by our present examination of the case. There was no recovery for delay. That was not the cause of the injury. If the cattle had been fed and watered no cause of action would have existed. It is because they were not, through the sole fault of the defendant, that the injury occurred, and the damages were recovered.

The case was carefully tried, and great care was exercised to present the case to the jury in accordance with our views on the previous appeal. We do not think any error was committed which renders it our duty to grant a new trial.

The judgment should be affirmed with costs.

All concur, except FOLGER, Ch. J.; and EABL, J., dissenting, and RAPALLO, J., absent at argument.

Judgment affirmed.

## Statement of case.

JAMES E. DELANEY, Respondent, v. WILLIAM C. VAN AULEN,  
Appellant.

The will of K. gave her residuary estate, real and personal, to her executors in trust to receive the rents and profits of the real estate, to invest and keep invested the personal estate, and to apply such rents and profits and the interest or income of the personalty to the use of her husband for life, except that they should apply to the use of the plaintiff who the will states was brought up by the testatrix, "the sum of \$500 per annum thereout," until he reached the age of twenty-one, after that "the sum of \$1,000 thereout," during the life of her husband, and after that "\$2,000 thereout during his natural life." There was no gift of the remainder. The testatrix had a brother living at the time of making the will, who survived her; at the date of the will, and at the time of the death of the testatrix the income from the residuary estate was ample to pay the annuities so given to plaintiff and to leave a larger sum for the husband. After the death of the latter the property did not yield enough to keep the real estate in good repair, to pay taxes and incidental expenses, and to pay plaintiff his annuity. In an action asking for a construction of the will and that the deficiency be paid out of the *corpus* of the estate, *held*, that the intention of the testatrix was that the gift to the plaintiff should be paid only from the annual profits of the estate; and that no part of the *corpus* of the estate could be applied to make up the deficiency; also that the trust was to receive and apply the income during the lives of the beneficiaries named and the life of the survivor.

As to whether plaintiff has the right to have deficiencies in payments made up from increased avails in after years *quære*.

The old chancery rule construing testamentary gifts of fixed sums by way of annuities payable out of rents and profits, as authorizing the taking of a sufficient sum from the body of the estate to make up a deficiency, stated to have been modified, so that in such cases the intention of the testator is to be ascertained and effect given to it.

The authorities on the subject collated and discussed.

*Delaney v. Van Aulen* (Mem., 21 Hun, 274), reversed.

(Argued January 20, 1881; decided February 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 11, 1880, affirming a judgment in favor of plaintiff, entered on a decision of the court on trial at Special Term. (Mem. of decision below, 21 Hun, 274.)

## Statement of case.

This action was brought by plaintiff as legatee under the will of Mary S. Kirby, deceased, for a construction of the will, he asking that the provision for him "be adjudged to be a demonstrative legacy, payable out of the principal of the estate in case of a deficiency of income, and that defendant as trustee under the will be required to pay out of the estate an alleged deficiency."

The substance of the will in question and the material facts appear in the opinion.

*Samuel Hand* for appellant. Plaintiff has no title whatever of any sort in the *corpus* of the estate. (1 R. S., 729, § 60; *Boynton v. Hoyt*, 1 Den. 53; *Grout v. Van Schoonhoven*, 1 Sandf. Ch. 336; *Perry on Trusts*, 524; *Forbes v. Richardson*, 11 Ilare, 354; *Long v. Short*, 1 P. Wms. 403; *Creed v. Creed* [H. of Lds.], 1 Drury & Warren, 416; *Addecott v. Addecott*, 29 Beav. 460; *Hindle v. Taylor*, 20 id. 109; *Baker v. Baker*, 6 H. of Lds. Cas. 616; *Earle v. Billingham*, 24 Beav. 445.) The executors hold the property absolutely in trust for certain purposes, and they cannot alienate or apply any part of it to any other purpose. (*In the Matter of Fero*, 9 How. Pr. 85.) They cannot change its investment. (1 R. S. 730, § 65; *Conger v. Jones*, 18 Barb. 467; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34.) A legacy to the widow, substantially in lieu of dower, and accepted by her as such, does not abate on a deficiency of assets. (*Heath v. Dindy*, 1 Russ. Ch. Cas. 543.)

*D. P. Barnard* for respondent. The testatrix intended that \$2,000 per annum of her property should go to the support and use of plaintiff. (2 Jarman, 204, 309, 534, 537; *Moseley v. Marshall*, 22 N. Y. 200; *Stewart v. Chambers*, 2 Sandf. Ch. 382.) The annuity is in the nature of a demonstrative legacy, and on a failure of the fund is to be made good out of the general assets. (2 Story's Eq. Jur., § 1064a; *Willard's Eq. Jur.* 502; *Walton v. Walton*, 7 Johns. Ch. 258, 262; *Enders v. Enders*, 2 Barb. S. C. 362, 365, 367; *Newton v.*

*Stanley*, 28 N. Y. 61; *Pierrepoint v. Edwards*, 25 id. 128; Williams on Executors, 995, 996, 1000, 1004; 1 Roper, 192, 203, 218, §§ 4, 193, 199, 208, 219, 220, 233; *La Grice v. Finch*, 3 Meriv. 50; *Wilcox v. Rhodes*, 2 Russ. Ch. 452; *Chanworth v. Beech*, 4 Ves. Ch. 555; *Gillaume v. Alderney*, 15 Ves. 383; *Sadler v. Turner*, 8 id. 617; *Raymond v. Brodbelt*, 5 id. 199; *Kirkpatrick v. Kirkpatrick*, cited in *Roberts v. Peacock*, 4 id. 159; *Mann v. Copland*, Madd. 223; *Creed v. Creed*, Cl. & F. 491; 1 Shep. Touchstone, 433.)

FOLGER, Ch. J. The testatrix, by her will, provided, first, for the payment of her debts and funeral expenses, and the purchase of a burial plot and the erection of a monument. She then made a specific bequest to a cousin of a few chattels of domestic or social use. She then devised and bequeathed to her executors, whom she named in her will, and to the survivor of them, all the residue of her estate, real and personal (she had both), in trust, to receive the rents and profits of the real estate, and to invest and keep invested the personal estate, and to apply those rents and profits, and the interest or income of the personal estate, to the use of her husband for his life, except that they should apply to the use of the plaintiff in this suit, who, the will says, was brought up by her, the sum of \$500 per annum thereout, till he reached twenty-one, after that \$1,000 per annum thereout, during the life of the husband; and after his death \$2,000 per annum thereout, during the natural life of the plaintiff. There is no devise or bequest of the remainder after the death of the plaintiff, though she had a brother living when she made the will, and who survived her, and is the defendant in this suit and the cousin above spoken of. At the date of the will, and at the time of the death of the testatrix, the rents and profits of the realty, and the income from the personalty, were ample to pay to the plaintiff the varying annuities contemplated by the will for him, and to leave a larger sum for the use of the husband. At those date sshe occupied one piece of the real estate as a homestead; other real estate yielded \$5,000 per annum. The

personal property was a mortgage of \$18,000 at seven per cent interest. Since her death, and since the death of her husband, in the mutations of affairs, the property has failed to yield enough to keep the real estate in good repair, to pay taxes and other incidental expenses, and to put the trustee in funds with which to pay the plaintiff his annuity. The plaintiff asks judgment in this suit, for a construction of the will; and that the provision for him be adjudged a demonstrative legacy, payable out of the *corpus* of the estate, whenever there is a deficiency of rents and income; and that a deficiency that had in fact arisen when the suit was begun be paid therefrom.

There can be no question that the testatrix, when she made her will, looked upon the rents, profits and income of her estate as enough to pay this annuity, to leave a larger sum for the use of her husband during his life, and for a surplus for her next of kin after his death. She designated the profits as the fund from which the sum should come with which to pay the annuity. But the inquiry may not stop there. It is to be pushed further, until it is learned whether she meant if that fund failed, that nevertheless the plaintiff should be paid his annuity every year in full, though the body of the estate should be impaired or consumed, and her husband in his life-time, and her next of kin after his death, get nothing. This, at first blush, seems a purpose so extreme as not to be attributed to the testatrix, unless the words she has used, as construed by inexorable rules, and the circumstances of the case, clearly lead thereto. The words of the will are to the effect that the rents, profits and income of the estate shall furnish the means to pay the plaintiff's annuity. They are given to the executors in trust to receive and apply. Generally speaking, the interpretation of the words "rents and profits" is, that they mean the annual rents and profits. (*Heneage v. Lord Andover*, 3 Younge & Jervis, 360; *Allan v. Backhouse*, 2 Ves. & Beames, 65.) If there were no contrary adjudication it could be fairly argued that a direction to raise money by annual rents and profits is to be put in contradistinction to a sale and mortgage. (2 Ves. & Beames, *supra*.) Indeed the Vice-Chancellor of

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England, in *Forbes v. Richardson* (11 Hare, 354) said: "I do not find any case where a direction for payment out of annual rents and profits has been held to give a right against the *corpus*, or beyond the annual or current rents and profits." This remark, however, in view of other decisions, must be confined to a direction, where the word "annual" is expressly or by most clear implication attached to the words "rents and profits." It is not too much to say, however, that the meaning most naturally to be got from a direction to take rents and profits and thereout to pay a sum of money would confine the means to pay to the moneys derived from the rents and profits as they came to hand from year to year, and would not extend to an appropriation of the body of the estate. Lord ELDON said in *Boote v. Blundell* (1 Mer. 192): "If I were asked this question anywhere but in Westminster Hall, I should answer in the affirmative, that by profits he probably meant annual profits only." Judge COWEN, in *Bloomer v. Waldron* (3 Hill, 361) indicates the same opinion, and says that the natural and obvious meaning of the words has been departed from in chancery to such a degree as may entrap a plain man; and that a forced and unnatural interpretation has been gone into in pressing exigencies. Yet that interpretation has become, with some limitations, a well-established rule of chancery. "Whatever might have been the interpretation of these words had the case been new, whatever doubt might arise upon them as denoting annual or permanent profit," says Sir THOMAS PLUMER, "it is now too late to speculate, this court having by a technical, artificial but liberal construction, in a series of authorities, admitting it to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time, when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." (*Allan v. Backhouse*, *supra*.) He cites and discusses many cases and adds: "The rule has now become an established one of construction, not permitting the court to exercise any discretion." That was in 1813. Two things are to be noticed in the first of these remarks, as somewhat limit-

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ing the extent of it. First, that the object of the power is to raise a gross sum at a fixed time, which must be raised and paid without delay, and, second, that the direction is not restrained by other words. Many of the cases are where legacies are to be paid out of the profits; a legacy is a gross sum, and generally to be paid at a fixed time and without delay. Some of them are cases of annuities which, though payable from time to time, are at each time of payment gross sums and payable at fixed times. An annuity falls within the rule, unless the other words of the will restrain it. We think though that later adjudications have somewhat relaxed the rule, looking at the purpose that first set it up, viz.: by a liberal construction of the words of the testator taking them to amount to a direction to sell, so as to obtain the end that the testator intended by raising the money. (2 Story's Eq. Jur., § 1064 a; *Green v. Belchier*, 1 Atk. 505.) So that it has come in the course of judgment, that not only the other words of the will may restrain the operation of the rule, but so may all other indications which courts are wont to note, in order to gather the intention of the maker of a disposing instrument in writing. The courts have been ready to take hold of the context of wills to hold the rule in check. (*Wilson v. Halliley*, 1 Russ & Mylne, 590; *Small v. Wing*, 5 Bro. P. C. [Tomlin's ed.] 66; 3 Younge & Jervis, *supra*.) And where the rule has been applied, the use of it has at times been justified, only by such being the intention of the testator as derived from all the words of the will. (*Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70.) Indeed, it may now be said that there is no principle whatever involved in these cases, save to ascertain what is the testator's intention and to carry that intention into effect (*Baker v. Baker*, 6 H. of L. 616); wherein that construction is to be given, that under the circumstances appears to be the correct one, each case getting little aid from the authorities, and depending in a great degree upon its own circumstances and language. (Id.; *per* Lord CHELMSFORD, Lord Chancellor; *per* Lord CAIRNS, L. J.; *Birch v. Sherratt*, L. R., 2 Ch. App. 642, [\* 644].) As expressed by Lord CRANWORTH, in *Baker v. Baker* (*supra*), the

real question is, is that which is given, given as an annuity, or as the interest of a fund ; does the language of the testator import that a sum at all events is annually to be paid out of his general estate, or only that it is the interest, or a portion of the interest, of a capital sum that is to be set apart. So DENIO, J., says: "No positive rule of ready application to every case can be laid down, but each will depend upon a consideration of all the material provisions of the will to be construed, and of the extrinsic circumstances respecting the testator's family and estate, which may be fairly brought to bear on the question of intent"; (see *Pierrepont v. Edwards*, 25 N. Y. 128), the authority of which case, it is plain, fettered the judgment of the learned General Term. He further says, that "the leading principle of the cases is that when the testator bequeathes a sum of money, or which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund," and cites *Dickin v. Edwards* (4 Hare, 273). We cannot fail to perceive that the rigid rule stated in *Allan v. Backhouse* (*supra*) has been relaxed, and that the courts may now exercise their judgment. And the question arises in every such case, which was the primary and most material portion of the testator's intent, and which was, in his mind, the incident to such primary intention (*Id.*), and this may be gathered from the context of the will, and from such extrinsic circumstances as are properly taken into view in such a case.

Let us then look first at the will in all its parts. The devise and bequest is of the residue of the estate of the testatrix, real and personal, and though the trust is to receive the rents, profits and income, this does not prevent the vesting in the executors of the legal title during the life of the *cestuis que trust*. (1 R. S. 728, § 55, sub. 3 ; *id.* 729, § 60 ; *Craig v. Craig*, 3 Barb. Ch. 76-94.) The direction to keep the personal estate invested on bond and mortgage and in public



stocks is not an indication of much weight that the body of the fund shall not be liable for the full and prompt payment of the annuity. Many of the cases to the contrary show equivalent directions. But the direction how to apply the moneys received by the executors has much significance. It reads thus: "To apply said rents and profits of real estate, and interest or income of personal estate, to the use of my husband William L. Kirby during his natural life." Here is not a direction to pay a fixed sum at a specified time, and without delay, but to devote that which is received, be it more or less, to the use of the beneficiary. Clearly this is not given as an annuity. It is given as the current avails of a fund. It does not import that a sum, at all events, is annually to be paid out of the estate, but only that the profits of a capital sum, that is to be set apart, are to be so paid. It is manifestly impossible ever to say, so long as the trust property yields any profits or income, that the husband is to have any thing, more or less, than the sum annually yielded, or to have it from any other source than from the annual yield. In his case there never could be a claim that the body of the trust fund should be cloven in two to yield him a sum; for the query would be at once what sum? No sum is named that he is to have. There is no determinate time for raising it. (1 Atk., *supra*, p. 507.) He is to have rents and profits and income, be they more or less. He is to have them when they come in, be it sooner or later. As to her husband then, there is nothing to show an intention in the testatrix that the *corpus* of the estate should be taken for his use; rather the contrary is shown, that he is to have only annual rents, profits and income, though they vary in amount, from year to year. At once, the query arises, did the testatrix intend, could she have intended, better things for the youth she had brought up, than for the man she had married and lived with until death? Now the provision for the plaintiff is not, in the full sense of the word, one independent of that for the husband. It is grafted upon it. It is by way of exception from it. The executors are to apply all the rents, profits and income to the use of the husband, except that they shall apply to the use of

James E. Delaney, thereout, the sums named in the will; one of them yearly, until he arrived at age; after that, another yearly, during the life-time of the husband, and after the decease of the husband, another yearly during his own life-time. The money for Delaney is excepted out of other moneys. Those other moneys are to be raised in a certain way. Can the thing to be excepted out of another be raised in a different way from that other? If it can, and shall be, then it will not be money from those moneys, but other money, and not a part taken from those moneys. The effect of this exception, during the life-time of the husband, is that the sum named for the use of Delaney was first to be deducted from the yearly avails of the estate, and the residue to be applied to the use of the husband. If Delaney had died during the husband's life, the latter would have taken the whole yearly avails. (16 N. Y. 368.) This was tantamount to a gift to the husband of a life-interest in the residue and overplus of the rents and profits, after the satisfaction of a certain yearly charge thereon. That form of gift has been held to be a manifest declaration, that the charge is to be satisfied out of the same rents and profits of which the residue is so given. (*Heneage v. Lord Andover supra.*) It is true that she contemplated, as the will shows, that Delaney would survive her husband; but it shows also, that she contemplated that each would live after her, to take the provision made for him. We have seen that the provision for the husband does not bring the case within the rule invoked for this plaintiff. It is not to be said that an exception from that provision is greater and more forceful in this respect than the provision itself. For consider that the rule grew up, by the courts striving to carry out the intent of the testator, that a gift made by him should be enjoyed, though the particular means he looked to and named for the purpose failed therefor. Now the intent of the testatrix here was as much, if not more, that her gift to her husband should be enjoyed, as that to Delaney should, and we cannot therefore say that she had an intention that Delaney's gift should be satisfied, to the impairment or consumption of the estate, for that would be the destruction

of the gift to the husband and a thwarting of her intentions for him. Both intentions can be better carried out, by saying that the annual avails shall alone be used as far as they will go and the *corpus* be preserved intact to make an annual yield. For to attribute the other intention to the testatrix would be also to attribute to her an intention that in a possible event, not resulting from his conduct, her husband should be deprived of any share in her bounty, which would be discordant with all that the will and the circumstances show.

The will makes no disposition of the fund after the death of Delaney. A like fact, in other cases, has been given different effects. Here, it may have been without forecast, or in unconcern for the ultimate result. It is not certain how it was. She left a brother who was her only heir at law and next of kin. It is not impossible that she may have been advised that the law would give to him, or to his descendants, in the absence of a testamentary disposition, all of her estate that should remain after the death of Delaney. We do not think that the lack of an especial gift of the remainder furnishes, in this case, much indication of intention to charge the *corpus*. (See *Philips v. Gutteridge*, *supra*.) We think that in other respects the form of the gift to Delaney indicates an intention that it shall be got from the annual avails. It is not in direct terms a gift to him of a sum out of the profits. It is an exception from a prior gift. The prior gift was, in the mind of the testatrix, the first thing. The way in which that was to be raised is the way not only for it, but for that which is excepted from it. If that is to be got from the yearly profits, then that which is to be deducted from it is also to be got therefrom. If the testatrix had had a different intention as to these two gifts, in this respect, she would have made distinct expression of it. But the same expression runs through the two gifts. The rents, profits and income are to be applied to the use of her husband, except that thereout shall be a sum applied to the use of Delaney. We think too that it must be conceded that the trust to receive the rents and profits, and to apply to the use

of the husband during life, and to a certain amount to the use of Delaney during life, is equivalent to a trust to receive during the lives of those beneficiaries, and the life of the survivor, and to apply. Then comes in the distinction noted in *Phillips v. Gutteridge* (3 De G. J. & S. \*832), for the right to receive the profits is not general and indefinite; it has a limitation of time.

It is in the words of the will, too, that one of these beneficiaries was the husband of the testatrix, and that the other is the object of her favor from having been brought up by her. Naturally, we would think she would have preferred her husband, as an object of favor, to Delaney, and the will itself indicates that she did, in its larger provision for the former. We are aware that Lord ELDON said in *Bootle v. Blundell supra*, that circumstances *dehors* the will, such as the greater degree of personal favor which the testator must be presumed to have felt toward this or that object of bounty, ought to be set aside on a question like this, which is fit to be decided only by an examination of the whole will taken together. Here, however, the will itself gives to some extent the basis for the presumption, in its description of the beneficiaries, and in the greater sum intended for one. Besides, it seems now to be a recognized aid to construction, that one or the other beneficiary named appears to be the primary object of the testator's bounty. (*Per* SELDEN, J., *Giddings v. Seward*, 16 N. Y. 365-367.)

We may now see whether there is any extrinsic circumstance that will show an intention in the testatrix. (*De Nottebeck v. Astor*, 13 N. Y. 98.) The extrinsic circumstance most significant is, that during the life of the testatrix, at the time she made her will and from thence until her death, the avails of her estate were ample to carry out her directions, without trenching upon the body of it. She well knew that this was so. It does not appear that she had any reason to apprehend that it would not measurably continue to be so. She was not engaged in business, we may assume; so that there could be no great indebtedness to meet. She made no provisions prior to

the gift of the residuum that would take largely from the estate, so that there would be no material diminution of it before it reached the trust fund. The estate was not exposed to the hazards of business, and might well be looked to as stable. It was left by her to the executors, just as she had kept it in her life and found it sufficient for her needs. She shaped her purposes by measurement of them with it, and gave it with no direction for a change of its condition, but rather with the implied direction to keep it in like state. To be sure, it must be so in most cases, that the testator anticipated that the profits would be enough to carry out his purpose, and his anticipation must have failed, or the question would not have come into the courts, whether the *corpus* could be invaded. Yet that the anticipation well founded, is sometimes, of some effect in arriving at the intention, is seen from *Baker v. Baker* (6 H. of L. Cases, *supra*), where the Lord Chancellor argued against a construction that would take from the fund itself to make up a deficiency of annual avails, that such a course might, in time, utterly annihilate the *corpus*, and the beneficiary be left without any provision at all; and that, therefore, nobody could suppose that such an intention could ever have existed in the mind of the testator—an idea which is peculiarly applicable here, as it would not take long, if the whole or a large part of the annuity is to be paid yearly from the fund, to exhaust it entirely.

For these reasons, we think that the intention of the testatrix was that the gift to the plaintiff should arise from the annual profits of the estate only.

We have not considered the question, whether the plaintiff has the right to have deficiencies in yearly payments made up from increased avails in after years, for the reason that neither the pleadings nor the facts present the question.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

ROSA WACHTEL, as Administratrix, etc., Respondent, v. THE NOAH WIDOWS AND ORPHANS' BENEVOLENT SOCIETY, Appellant.

An association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard.

*It seems* that in the absence of any agreement by the members or any provision in the charter or by-laws for a different mode of service, notice should be served personally.

One of defendant's by-laws provided for giving written notice to any member in arrears six months for dues, calling his attention to the fact that he will be stricken from the roll in case he does not pay his dues. Another by-law imposed a fine for an omission of a member to give notice to the association of a change of residence. At the time of joining, plaintiff's intestate gave notice of his then place of residence; he subsequently changed his residence but did not give notice. Because of failure to pay his dues he was struck from the rolls. No notice was given him as provided by the by-laws. In an action brought to recover the sum provided by defendant's by-laws to be paid on the death of a member, *held*, that plaintiff was entitled to recover; that the omission of the deceased to give notice of change of residence was no excuse for a failure to give him the prescribed notice.

(Argued January 26, 1881; decided February 1, 1881.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 18, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought by plaintiff, as administratrix of David Wachtel, deceased, against defendant, a benevolent association, organized under the laws of the State of New York, to recover the sum of \$560, which defendant, by its constitution, agreed to pay, upon the death of a member, to his personal representatives.

The defense was that the deceased had been, prior to his death, expelled from the association for non-payment of dues.

The facts appear sufficiently in the opinion.

## Statement of case.

*A. J. Dittenhoefer* for appellant. The deceased having made it impossible to serve notice of arrearage personally, such non-service does not invalidate the expulsion, provided due diligence in trying to make the service is shown. (Story on Bills, p. 344, § 299; *Summers v. Belt*, 35 Mo. 461; 1 Parsons on Bills, 329; 3 Kent's Com. 153; *Hunt v. Maybee*, 3 Seld. 266; *Bateman v. Joseph*, 2 Camp. 462; *Rhett v. Col.*, 15 Curtis, 164, Sup. Ct. Dec.; *Dickens v. Beal*, 10 Peters, 246; *S. C.*, 12 Curtis, 253; *Williams v. The Bk. of the U. S.*, 2 Peters, 96; *Ransom v. Mack*, 2 Hill, 587; *Van Vechten v. Pruyn*, 13 N. Y. 551.)

*Ferdinand Kurzman* for respondent. As regards the passage of the amendments of its by-laws, the defendant must show affirmatively and in detail that all its proceedings were regular and legal. (*Green v. African M. E. S.*, 1 S. & R. 254; *Rex v. Mayor of Liverpool*, 2 Burr. 732; *Baggs' Case*, 11 Coke, 99.) There is no presumption that the absent members of a corporate body know what is done at a stated meeting, so as to charge them with notice of any thing there transacted contemplating future action at a time other than that of a stated meeting, and notice should be given. (*People v. Batcheler*, 22 N. Y. 128.) If the charter requires a special notice it cannot be dispensed with even by consent. (*Rex v. Theodorick*, 8 East, 543) As regards expulsion, a member cannot be expelled for any cause, unless duly notified to appear and given an opportunity to be heard. (Angell & Ames on Corp., § 420; *Southern Pl. R. Co. v. Hixon*, 5 Ind. 165; *Commonwealth v. St. Pat. Ben. So.*, 2 Binn. 448; *State v. Adams*, 45 Mo. 570; *People v. San Francisco Ben. Soc.*, 24 How. 216; *Bartlett v. Med. Soc.*, 32 N. Y. 187; *People v. Sailors' Snug Harbor*, 5 Abb. [N. S.] 119; *People ex rel. Doyle v. N. Y. Ben. Soc.*, 3 Hun, 361; *Diligent Fire Ins. Co. v. Comm.*, 75 Penn. St. 291; 24 How. 216; 32 N. Y. 187; *Jones v. Wylie*, 1 Car. & P. 257, 264; *People ex rel. Elliott v. N. Y. Cotton Ex.*, 8 Hun, 216, 220; *Leech v. Harris*, 2 Brewst. [Penn.] 571; Field on Corp., § 65; Angell & Ames on Corp., § 420,

etc.) It is a case of property, of legal rights, and if there had been a by-law that any member might be expelled by a vote of the society, in his absence and without notice, such by-law would have been illegal. (*People v. San Francisco Ben. Soc.*, 24 How. 219.)

DANFORTH, J. It is well settled that an association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the person charged, or without giving him an opportunity to be heard. (Ang. & Ames on Corp., § 420; *People ex rel. Barilett v. Med. Soc.*, 32 N. Y. 187; *Com. v. Penn. Ben. Ins.*, 2 Serg. & R. 141; *Innes v. Wylie*, 1 C. & K. 257). This general rule of law is recognized by the defendant's by-law as applicable to one who from any cause should fail to pay his monthly contribution. It is in these words: "The financial secretary shall give to each member who is six months in arrears a written notice, calling his attention to the fact that he shall be stricken from the roll in case he does not pay his dues in thirty days." It is admitted that the deceased was in arrears, but it is established as a fact that the notice provided for in such a case was not given to him. It is said, however, by the learned counsel for the appellant, that this omission was caused by the failure of the deceased to give notice to the association of his change of residence. It does not appear that he was under any obligation to do so. At the time he became a member of the society, he notified it that his then place of residence was 41 First street, in the city of New York, but he subsequently removed to East Eighteenth street. There is nothing to show that the object of the information as to residence was to enable the defendant to serve its notice at that place, or that the deceased agreed that they might be left at his house. There are many other reasons why it would be well for such an association to know the residence of its members; but however that may be, the defendant, by another by-law, defined the penalty for neglect in giving notice of a change of residence. It declares that for such omission the member in default shall incur a



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Statement of case.

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fine of twenty-five cents. It would lead to a most unjust result, if there should be added, a forfeiture of the whole benefit to which his representatives are, in case of his death, entitled. Such consequence is not declared and cannot be implied by any legal construction. In the absence of any agreement by the member, or any provision in the charter or by-laws, for a different mode of service, it should be made personally, as required at common law, where the object is to deprive a party of his rights or property; or if that can be dispensed with, then in such other mode as will be most likely to effect its object. Here there was no service, and the court has found that its omission is not excused. This conclusion is well warranted by the facts found, and the judgment should be affirmed.

All concur.

Judgment affirmed.

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GATES WISEMAN et al., Executors, etc., Respondents, v. JACOB LUCKSINGER, Appellant.

A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license: it can only be granted "by deed or conveyance in writing." (2 R. S. 134, § 6.)

The parol contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but with its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement.

A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor.

The parties owned adjoining city lots, fronting upon a street in which there was no sewer. Defendant built an underground drain or sewer of plank from his house to a sewer in another street; he gave to plaintiff, for the consideration of \$7, a writing stating that the money was received "for the right to drain through my premises," and plaintiff thereupon built a similar drain of plank connecting with defendant's drain. After the lapse

## Statement of case.

of over twenty years, plaintiff took up his drain and replaced it with a drain of tile of greater capacity than defendant's, and also made changes in his privy vault, and thereafter the filth and foul water from his privy flowed back into defendant's cellar; thereupon defendant, on his own land, cut off the connection and refused to allow plaintiff to go upon his premises to open and repair the drain. In an action to restrain defendant from obstructing the sewer and for damages, *held*, that the agreement indicated by the writing could not be inferred to be a permanent one, but it would be satisfied by regarding it as a temporary arrangement, and should be so construed; that the agreement so indicated was good as a license giving plaintiff immunity while acting under it, but giving no vested right to the use or enjoyment of the privilege, against the will of the grantor; and that, therefore, it was revocable at the pleasure of the latter.

Also, *held*, that twenty years' user did not give plaintiff a prescriptive right to the easement, as the possession was by consent of defendant and there could be no adverse possession until defendant cut off plaintiff's drain.

*Wetmore v. White* (2 Cal. Cas. 87), *Brown v. Bowen* (30 N. Y. 541), *Rindge v. Baker* (57 id. 209), *Pierrepont v. Barnard* (6 id. 304), *Miller v. A. & S. R. R. Co.* (6 Hill, 63), *Wolfe v. Frost* (4 Sandf. Ch. 93), *Sibley v. Ellis* (11 Gray, 417), *Ward v. Warren* (82 N. Y. 265), *La Frombois v. Jackson* (8 Cow. 589), *Briggs v. Prosser* (14 Wend. 227), *Ashley v. Ashley* (4 Gray, 197), distinguished.

(Argued January 17, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 26, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at a Special Term.

This action was brought to restrain defendant from interfering with plaintiff's alleged right of drainage across defendant's premises, and for damages, etc.

The facts appear sufficiently in the opinion.

*D. Pratt* for appellant. An easement of the character of the one in suit can only be created by deed or grant, or by prescription, from which a grant may be inferred. (Addison on Torts, 130; 3 Kent's Com. 419; Angell on Water-courses, § 168; 1 Coke Lit. 9 a; Gilbert's Law on Evidence, 96 [6th ed.]; *Fentinam v. Smith*, 4 East, 109; 2 H. Blackst. 259; *Hewlings v. Shipman*, 5 Barn. & Cress. 321, *Pitkins v. L. I.*

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*R. R. Co.*, 2 Barb. Ch. 230; *Brown v. Woodworth*, 5 Barb. 550; *Wolf v. Frost*, 4 Sandf. Ch. 72; 2 Barb. Ch. 230; *Applegate v. Morse*, 7 Lans. 60, 61; *Babcock v. Utter*, Abb. Ct. of App. Cas. 27; Angell on Water-courses, §§ 286, 287, 288; *Parker v. Foote*, 19 Wend. 309.) No right by prescription was shown. (Angell, etc., §§ 210-214; Laws of Easement, 121; 7 Lans. 61; Angell's Sup., §§ 213, 216; *Burbank v. Fay*, 65 N. Y. 57, 65; Washburn on Easements, 124, § 27; 1 Washburn on Real Property, 541, etc.; 2 id. 274; *St. Vincent Orphan Asylum v. City of Troy*, 76 N. Y. 108, 113; *Applegate v. Morse*, 7 Lans. 61; *Luce v. Carley*, 24 Wend. 451; *Colvin v. Burnet*, 17 id. 564; *Hart v. Vose*, 19 id. 365; *Mumford v. Whiting*, 15 id. 380; *Parker v. Foote*, 13 id. 309; *Hewlings v. Shipman*, 5 Barn. & Cress. 221; *Cocker v. Cowper*, 1 Crompt. Mees. & Rosc. 418; *Borden v. South Side R. R. Co.*, 5 Hun, 184; *Babcock v. Utter*, 1 Abb. App. Cas. 27; 1 Washburn on Real Property, 406, marg.; *Arnold v. Stearns*, 24 Pick. 106; Angell, etc., § 2019; 7 Wheat. 109; 1 Johns. 156; *Adams v. Van Alstine*, 25 N. Y. 238; Washburn, 137.) The extent of the presumed right is determined by the user upon which is founded the presumed grant. (Angell, etc., 224; Washburn on Easements, 109, 123; 2 Washburn on Real Estate, 342.) The use of said sewer for draining the filth and accumulations of the plaintiffs' privies through it is not authorized by the original use of the same. (Washburn on Easements, 53, § 22; *Butterworth v. Crawford*, 46 N. Y. 349; *Burbank v. Fay*, 65 id. 57; *Markham v. Stowe*, 66 id. 574.) A valuable consideration alone is never held in this State to take a parol agreement for the sale of lands out of the statute of frauds. (*Wolf v. Frost*, 4 Sandf. Ch. 72.) Such a parol agreement applied to an easement amounts simply to a license, and is revocable at any time by the licensee. (*Applegate v. Morse*, 7 Lans. 60; *Hewlings v. Shipman*, 5 Barn. & Cress. 221; *Luce v. Carley*, 24 Wend. 451; *Babcock v. Utter*, 1 Abb. App. Cas. 27.) The court should not have allowed costs. (*Johnson v. Taber*, 10 N. Y. 319.)

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*Wm. C. Ruger* for respondents. The parol contract for an easement having been executed, the parties are estopped from denying the existence of the right. (*Brown v. Bowen*, 30 N. Y. 541; *Le Fevre v. Le Fevre*, 4 S. & R. 241; *Renick v. Kern*, 14 id. 267; *Lacy v. Arnett*, 33 Penn. St. 169; *Snowden v. Vilas*, 19 Ind. 10; *Cumberland R. R. Co. v. McCarnly*, 59 Penn. St. 23.) Courts of equity have everywhere, upon the two-fold ground of estoppel and the prevention of fraud, given effect to parol agreements for the grant of an easement, when founded upon a valuable consideration. (*Rindge v. Baker*, 57 N. Y. 209; *Wetmore v. White*, 2 Caine's Cas. 87; *Babcock v. Utter*, 1 Abb. Ct. of App. Dec. 27; *Pierrepoint v. Brainard*, 6 N. Y. 304; *Miller v. A. & S. R. R. Co.*, 6 Hill, 63; *Wolfe v. Frost*, 4 Sandf. Ch. 93, 94, 95; *Hall v. Chaffees*, 13 Vt. 157, note; *Foster v. Browning*, 4 R. I. 53; *Prince v. Case*, 10 Conn. 480; *Short v. Taylor*, 2 Eq. Cas. Abr. 523, pl. 3; *East India Co. v. Vincett*, 2 Atk. 83; *Duke of Devonshire v. Elgin*, 14 Beav. 530; *Powell v. Thomas*, 6 Hare, 300; *Hervey v. Smith*, 23 Beav. 299; *Morland v. Richardson*, 22 id. 596; *Gale on Easements* [2d ed.], 99; 1 Addison on Torts, 186, 187; *Cooley on Torts*, 306, 312, § 21; 21 Alb. L. J. 441; *Cooley on Torts*, 311.) The plaintiffs having established an adverse enjoyment for twenty-five years of the right to drain through the defendant's premises, they have thereby gained title to such easement by prescription and a court of equity has undoubted jurisdiction to define and establish the rights of the parties. (*Belknap v. Tremble*, 3 Paige, 577, 586; *Sibley v. Ellis*, 11 Gray, 417; *Corning v. Gould*, 16 Wend. 531; *Miller v. Garlock*, 8 Barb. 531; 8 Pick. 504; 36 Vt. 503; *Ward v. Warren*, 11 N. Y. Wkly. Dig. 89, 90; Court of Appeals, Oct. 5, 1880; *Angus v. Dalton*, L. R., 4 Q. B. D. 162.) The plaintiffs' testator having entered upon the enjoyment of the easement in question, under a contract founded upon a valuable consideration, and continued in the enjoyment thereof for more than twenty years, such user was adverse. (*Washburn on Easements* [2d ed.], 124; *Hammond v. Zehner*, 21 N. Y. 118; *Laro v. McDonald*, 9 Hun, 23; *Legg v. Horn*, 45 Conn. 409; *Ashley*

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v. *Ashley*, 4 Gray, 197; *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175; *Clapp v. Bromagham*, 9 Cow. 530, 556, 557; *La Frombois v. Jackson*, 8 id. 589, 597; *Briggs v. Prosser*, 14 Wend. 227; *Bogardus v. Trinity Ch.*, 4 Sandf. Ch. 633; *Comines v. Comines*, 21 Conn. 413; *Sumner v. Stearnes*, 6 Metc. 337; *Steele v. Johnson*, 4 Allen, 425; *La Frombois v. Jackson*, 8 Cow. 389, 597; *Clapp v. Bromagham*, 9 id. 550, 556, 557; *Briggs v. Prosser*, 14 Wend. 227; *Dewhurst v. Wrigley*, C. P. Cooper, 329, note; *Goddard on Easements*, 115; *Brown v. Windsor*, 1 Cr. & Jer. 20; *Arbuckle v. Ward*, 29 Vt. 43, 52; *Perrin v. Garfield*, 37 Vt. 310; *Washburn on Easements* [2d ed.], 125; 1 Addison on Torts, 156.) The plaintiffs being satisfied to accept the easement according to the original limits thereof, the defendant cannot complain. (*Cooper v. Hubbard*, 30 Beav. 160, 165; 1 Addison on Torts, 152; *Washburn on Easements* [2d ed.], 62, 63; *Brooks v. Curtis*, 4 Lans. 286; *S. C.* on appeal, 50 N. Y. 645; *Beals v. Stewart*, 6 Lans. 408; *Prescott v. White*, 21 Pick. 341; *McMillan v. Cronin*, 76 N. Y. 474; *Legg v. Horn*, 45 Conn. 409.) It was within the discretion of the court to award costs and such discretion cannot be now reviewed, no abuse of discretion being shown. (*Church v. Kidd*, 3 Hun, 271; *Baker v. White*, 1 Abb. Ct. App. Dec. 97.)

DANFORTH, J. Although the action is in equity, the plaintiffs sought compensation in damages as well as equitable relief. The former was denied to them, but the latter has been granted to the full extent asked for. I can discover no ground upon which it can be approved.

The parties are owners of adjoining city lots in the city of Syracuse. The defendant built an underground drain or sewer of plank from the basement of his house, through his own lot and that of one Stern, to Jefferson street sewer, and afterward "and more than twenty-five years last past, the plaintiff," as the trial court finds, "purchased of the defendant the right and easement to drain his premises, by an underground drain and covered sewer, through the defendant's premises, for the consideration of seven dol-

lars, which the plaintiff paid and the defendant accepted;” and thereupon the plaintiff, partly upon his own premises and partly on those of the defendant, built an underground sewer of plank to connect with the sewer of the defendant. The connection was made a short distance from the line dividing the respective lots. It is further found, that “the plaintiff for over twenty-five years enjoyed the privilege as of right of draining his own premises through this sewer, until July 22, 1876, when the connection was cut off by the defendant on his own land.” At that time he denied the plaintiff’s right, obstructed the flow of water, “and refused to allow the plaintiff to go upon his premises to maintain and repair the said sewer.” It is also found that “before this, and in 1873, the plaintiff caused his old sewer to be taken up and replaced with a tile sewer of a capacity greater than that of defendant’s sewer, with which it was connected.” The plaintiff had also made changes in the form of his privy vault, and the court found that “after this change, and the alteration and enlargement of his sewer by the plaintiff, the filth and foul water from his privy flowed back into the cellar of the defendant, creating stench and a great nuisance to defendant, rendering his house unfit to live in, and that to prevent such injury to his premises the defendant tore up said sewer.” The learned court also found, as a fact, that “no deed of conveyance of said easement or right to drain through said defendant’s premises was ever executed by defendant to plaintiff, nor was any written contract agreeing to convey ever executed by defendant or any one for him, except the receipt for seven dollars for the right to drain through defendant’s premises.” The receipt referred to was not produced upon the trial, but after proving its loss, the plaintiff was allowed to show its contents by his witnesses. Neither of them had seen the paper for many years, and there was some difference as to its form. It is not stated by the court in any other way than in the above finding, but it is given by one witness in these words: “Received of Joseph Wiseman, seven dollars, for the right to drain through my premises;” and this, he says, bore the signature of the

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defendant. It is adopted by the learned counsel for the respondents in his points, and is the form most favorable to his contention. The trial court found, "as conclusion of law and equity, that the plaintiff acquired the right of draining his premises on the defendant's premises more than twenty-five years before the said obstruction, and during all that time enjoyed the same as of right; that the plaintiff is entitled to judgment declaring his said right and easement on the defendant's premises and restraining him from interfering with the plaintiff's enjoyment of such easement; and that the plaintiff is entitled to go upon the defendant's premises to rebuild and repair the same." Judgment was entered accordingly, and it having been affirmed by the General Term, the defendant has appealed to this court.

The right awarded to the plaintiff to have his drain pass through the defendant's land is in the terms of the judgment an easement, and for its enjoyment requires that the plaintiff shall have an interest in the defendant's land.

In *Hewlins v. Shippam* (5 B. & C. 221; 11 Eng. Com. Law Rep., 207), the question was, whether a right to a drain running through the adjoining land could be conferred by parol license, and after the fullest examination it was decided that it could not. The facts in that case are singularly like those now before us, and make the conclusion reached of value upon this inquiry. *Cocker v. Cosper* (1 O. M. & R. 418) was a similar case. The plaintiff therein sued for the obstruction of a drain which had been originally constructed at his expense on the defendant's land by his consent verbally given. After it had been enjoyed for eighteen years, the defendant obstructed it. It was contended by the plaintiff that the license, having been acted upon, could not be revoked; but the court held that *Hewlins v. Shipman* (*supra*) was decisive to show that such an easement cannot be conferred except by deed. To the same effect are authorities cited by the appellant's counsel. It is, therefore, within the statute "of fraudulent conveyances and contracts relative to land," and could neither be created, granted or declared, except by deed

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or conveyance in writing (2 R. S., tit. 1, chap. VII, part 2, § 6, p. 134); so that consent, although in writing, will be of no more avail than it would be if given by word of mouth. Indeed this is conceded by the learned counsel for the plaintiff to be so at law; but he contends that in equity the case is otherwise, and says, that "courts of equity give effect to parol agreements for the grant of an easement when founded upon a valuable consideration." Assuming that to be so we may inquire whether there is any thing in this case to call for the exercise of such extraordinary jurisdiction. And first, the contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement. In such a case the application of the statute is withheld, lest by its interposition the mischief would be encouraged which the legislature intended to prevent. There is, I think, little danger of that in the present case. If we look at the situation of the parties at the time the contract was entered into, it will be difficult to infer that they considered the arrangement indicated by the writing to be a permanent one. The lots of both parties fronted upon a public street—in it there was no sewer. If there had been, it cannot be doubted, that as the easiest, cheapest and most natural way of drainage, they would have used it. As it was, the defendant was obliged, not only to carry his drain the whole length of his lot, but first by license, and then by purchase, acquire the right to cross another lot before an outlet for his drain could be had. His drain was built of plank, at little expense and soon perishable. While, in this condition, the plaintiff applies, according to his own testimony, for the privilege of draining his lot into the defendant's drain, and obtains it by the payment of seven dollars. So much the receipt indicates. There is nothing more. Its language is equivocal. It would be satisfied by drainage during the pleasure of the defendant, or during the life of the plaintiff, or until a public



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sewer should be constructed in the street by which the lot was bounded. There is nothing said as to how long it should continue. And when we consider the heavy imposition that would rest upon the defendant's lot, the annoyance from smells, the perpetual lien and incumbrance, necessarily rendering the land unsalable or of less value in the market—less available for improvement—compelling the defendant so to build that his structure should not interfere with the plaintiff's right of drainage, of inspection, of rebuilding and reparation, we find nothing which permits the inference that the permission indicated by the receipt was intended to be in perpetuity. The nature and character of the easement, the purpose which it was intended to serve, and other circumstances above adverted to, must be taken into account. The effect of the judgment is to deprive the defendant of the full enjoyment of his property, and subject it to the control of another. I am unable to find, in the words of the parties, any intention to produce that result. It is not expressed in the receipt, nor is it fairly to be implied. Full effect may be given to it by regarding it as a temporary arrangement; and it should, I think, be so construed.

Nor has any thing been done referable to such an agreement as one giving a right in perpetuity. The connecting sewer constructed by the plaintiff was of plank, of short length and trifling expense, temporary and not permanent in character, and, as subsequent events have shown, easily and necessarily displaced to make room for another better adapted to the increasing necessities of the plaintiff and his improved method of removing filth from his premises. The case is not analogous to *Wetmore v. White* (2 Cal. Cas. 87), *Brown v. Bowen* (30 N. Y. 541), *Rindge v. Baker* (57 id. 209), *Babcock v. Utter* (1 Abb. Ct. of App. Dec. 27), *Pierrepont v. Barnard* (6 N. Y. 304), *Miller v. A. & S. R. R.* (6 Hill, 63), or *Wolfe v. Frost* (4 Sandf. Ch. 93), cited by the learned counsel for the respondents. So far as they bear upon the question as to the effect of part performance, it will be seen that large expenditures were made upon permanent and valuable improvements, not reasonably to be accounted for except upon the

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belief, on the part of the person making them, that an actual interest or estate in the land had been acquired, not depending upon any contingency, or the will or acquiescence of another. This was so in *Wetmore v. White* (*supra*). Mills were erected, } for the use of which the easement in question was indispensable. } The court say: "Public accommodation and private emolument were probably the primary inducements for building the mills and diverting the water; the same reasons, for any thing that appears, now exist for their continuance." The defendant claimed the right to restore the water to its original channel, but the court denied it, on the ground that his conduct in not disclosing his right at the time of selling the mills, his sleeping so long upon the claim and permitting the appellant to expend his money in repairing and rebuilding the mills, was unconscientious and formed strong grounds for the interposition of a court of equity. *Brown v. Bowen* (*supra*) was an action for damages caused by defendants' acts in setting water back upon the plaintiff's mills, and a verdict for the plaintiff was sustained upon the ground that the defendants were by their conduct estopped from setting up a right to do the acts complained of. On the other hand, in *Babcock v. Utter* (1 Abb. Ct. of App. Dec. 27), it was held that the easement then in question, and which in character was like the one claimed here, was an interest in real estate, incapable of transmission by parol, and the question was, "whether it could be done by a court of equity, against the positive provisions of the statute." There the licensee given permitted the doing of an act on the land of the licensor by which water power had been secured. The defendant interfered with it and the plaintiff brought an action in equity to establish his easement, to restrain the defendant from diverting the water and for damages for the diversion already made. He failed in the action, the court saying: "A mere verbal license to do an act or a series of acts upon the land of the licensor necessarily excludes all idea of a right to do the act or acts by virtue of a contract, or promise, which equity might enforce specifically;" adding: "To grant the relief here prayed for would

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effectually subvert the legal right, or, which is the same thing in effect, forever prevent the exercise of those rights which unavoidably pertain to one seized of the undisputed legal title, and with which he has never consented to part." The consequences thus pointed out are illustrated by the judgment in this case. It gives to the plaintiff a right to the perpetual use of the defendant's land, although "there is no stipulation as to such title or right," and it is, therefore, as declared in the case cited, "as repugnant to the principles of equity as to the rules of law." I do not in detail state the other cases cited by the appellant, for as to them it is enough to say they decide nothing contrary to the views expressed in the case just referred to. While the argument of the learned Judge WELLES, in *Pierrepoint v. Barnard* (6 N. Y. 279) distinguishes between an easement and a license, *Miller v. A. & S. R. R. Co.* (6 Hill, 63) and *Wolfe v. Frost* (4 Sandf. Ch. 93) seem to support the appellant's view of the proper limitation to the plaintiff's rights. There are no doubt many cases in which courts recognize an equitable right to an easement without a deed; but there will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works, or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud upon the persons setting up the equitable right. But here there is no agreement for an easement, and no circumstances which render it inequitable in the defendant to insist upon the application of the statute.

The agreement, however, to be implied from the receipt was undoubtedly good as a license, giving to the plaintiff immunity while acting under its privilege, but no vested right entitling him to its use or enjoyment against the will of the grantor; and this presents the point of difference between the parties. In behalf of the plaintiff is claimed an indefeasible right to an easement, such as passes by deed only; while the defendant

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denies to him any interest except as licensee, and construes the receipt as a mere dispensation or license, which "properly passes" no interest nor alters or transfers property in any thing, but only makes an action lawful, which, without it, had been unlawful." (*Per VAUGHAN, Ch. J., Thomas v. Sorrell, Vaughan, 351.*) Therefore, the plaintiff had liberty to enter upon the defendant's land and lay his sewer, subject to interruption at the defendant's will, but nothing more; and this, except for the license, would have been unlawful. The principle upon which, after the fullest consideration *Babcock v. Utter (supra)*, and *St. Vincent Orphan Asylum v. City of Troy* (hereafter referred to), and *Wood v. Leadbitter* (13 M. & W. 838), were decided, applies here, and the case itself seems a reproduction of the one put by ALDERSON, J., in the one last cited. "Suppose," he says, "the case of a parol license to come on my lands, and there to make a water-course, to flow on the lands of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable." Now the receipt contains a mere license or permission to drain, and no agreement to convey an easement; nor is the license coupled with any interest in the land. It was, therefore, revocable, and its revocation did not operate as a fraud upon the plaintiff. His expenditures were trifling, and for aught that appears, have been more than repaid in the use already had by the plaintiff of the privilege given to him. There is no finding that by the action of the defendant he will be deprived of the means of drainage; and the contrary may not only be presumed, from the fact that the lot is on one of the public streets of the city, but if we look into the evidence, we see that there are sewers in neighboring streets to which access may be had, although doubtless with more expense and labor. Without regard however to these considerations, which apply to the equity of his case and not to any right, we have no doubt of the

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power of the <sup>d</sup>plaintiff to revoke the permission or license given. Nor does the fact of payment for the license alter the defendant's right. His permission to drain was still a mere license, and none the less revocable that it was paid for. (*Howlings v. Shippam*, 5 Barn. & Cress., ante.)

It is also contended, on behalf of the plaintiff, that the judgment may be sustained upon the ground that he has a prescriptive right to the easement. This claim is inconsistent with the theory of the action, as we find it disclosed in the complaint. There an agreement of purchase is set out, naming the price paid, and the averments of right subsequently made evidently refer to a right so acquired; and following that theory is the finding of the trial judge, based upon an agreement for which a consideration was paid. Moreover it is opposed to the claim that the agreement exists of which specific performance may be decreed; for to support it the possession and part performance must be with consent of the vendor, and in pursuance of and in reliance upon a contract, for otherwise there would be no fraud in the refusal of the vendor to execute or abide by his agreement. So if the possession was adverse; and in neither aspect would it present a feature for the jurisdiction of a court of equity. But I find nothing upon which this point can stand. The finding of the trial court is distinct: That within a short time after 1842, "and more than twenty-five years last past, the plaintiff purchased of the defendant the right and easement, for the consideration of seven dollars." Thus the acts of possession commenced by permission purchased for a price, the minds of both parties concurring. If we look at the testimony given on the trial, we also find that the plaintiff's theory, from the beginning to the end, was that "an arrangement was made between the plaintiff and the defendant in reference to the sewer." Such is the plaintiff's own evidence. He says he applied to the defendant for the privilege and obtained it — that he first obtained this right. He says, "He permitted me to get a sewer there at the time I built the house; I made the bargain with him to connect the sewer," and then did so. The defendant confirms this. Denying the receipt of

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money, he admits that he gave permission. As to that fact, there was no controversy between the parties; and it follows that there could be no adverse possession until after July, 1876, when the defendant did the thing complained of, and cutting off the plaintiff's sewer, forbade his entrance upon the premises. Up to that time, possession under the license or permission of the defendant prevented it from being adverse. But the question is well settled by authority. (*White v. Spencer*, 14 N. Y. 247-249; *Jackson v. McConnell*, 19 Wend. 177; *Jackson v. Parker*, 3 Johns. Cas. 124.) *The St. Vincent Orphan Asylum v. City of Troy* (12 Hun, 317) came before the Supreme Court in 1877. It appeared that in 1853 the defendant, by formal resolution of its common council, relinquished certain land theretofore used as a street, and in the same manner declared that the Troy Hospital, which then stood on the adjacent lot, was at liberty to inclose the land so relinquished within its grounds, for the use of that institution. This was done, and possession retained for more than twenty years. But thereafter the city sought to remove the wall, and in an action commenced against them, the plaintiff recovered. Upon appeal the General Term sustained the verdict, upon the ground that under the resolution of 1853, possession had been taken and permanent improvements made on the faith thereof, and held that the defendant was concluded by its resolution, "followed as it was by actual and continued occupation under claim of absolute right, especially in view of the improvements made on the faith of the action of the common council." Upon appeal to this court (76 N. Y. 108), the judgment was reversed. The view taken by the Supreme Court was relied upon in support of the judgment, and it was also urged that the plaintiff's possession was adverse to the title of any other claimant. This court, however, held, first, that the resolution of the common council was invalid for want of power; but in answer to the plaintiff's claim as one holding by adverse possession, say: "The plaintiff's occupation, at least previous to the rescission by the common council in 1868, was not an adverse possession within the statute of limitations;" adding: "The occupation

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of a grantee of the fee is perhaps hostile to his grantor, but not so as to a licensee." I am not able to see why this decision is not in point and conclusive upon us in this case. The resolution was general and unlimited in terms; it gave permission "to inclose" the land "for its use." It was held to be a license. It was also held to be invalid. But the court say: "The entry of the plaintiff was, nevertheless, under it, and the holding is not adverse." In the case before us, the words of the receipt are general and unlimited, "for the right to drain through my premises;" but if construed so as to give an interest in land or an easement, is invalid, because not in conformity to the statute. And the court further say: "The license being invalid and void, could of course be the foundation of no right in the plaintiff, but its entry and occupation thereunder was nevertheless no more adverse to the defendant than if the license had been valid." The same doctrine is asserted in many other cases, and is deemed so well settled, that it has found its way into the text-books, where, in various forms of words, it is declared that enjoyment had under a license or permission from the owner of the servient tenement confers no right as to the easement (Angell on Water-courses, § 216); and so the effect of the user would be destroyed, if it were shown that it took place by the express permission of the owner of the servient tenement; and the reason is, that such enjoyment is consistent with the right of the owner of that tenement, and consequently confers no right in opposition thereto. (*White v. Spencer, supra.*)

The case of *Sibley v. Ellis* (11 Gray, 417), cited by the respondent, is not in conflict with these propositions. It there appeared that the user began in a trespass and had continued open and adverse for twenty years. It was therefore held that the defendant had a prescriptive right. To the same effect are many other cases cited by him; but they have no tendency to support the demand of the plaintiff. His user has not been adverse, nor has it been under a claim of right. The trial court does not so find it, nor that it was adverse. In the recent

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case of *Ward v. Warren*, lately decided by this court,\* and to which our attention is called, the plaintiff claimed the title by prescription; and it was adjudged in his favor, because the trial court found "that the use of the way by him and his predecessors in the title had been adverse, under claim of right, exclusive, open and notorious, with the knowledge and acquiescence of defendants and their grantors, for forty-eight years." It was substantially so in the other cases cited by the respondent. Here there is no finding that the use was under a claim of right, or that it was adverse. On the contrary, the source of the plaintiff's possession was the defendant's permission; never under any claim of right, or in any sense adverse to the defendant. Our attention has been also directed to the following as authorities in favor of the plaintiff's contention. (Washburn on Easements, § 88; *La Frombois v. Jackson*, 8 Cow. 589; *Briggs v. Prosser*, 14 Wend. 227.) It is said by Washburn (*ante*), that although a right of way cannot be created by parol agreement, yet where, under such an agreement, the way was used for twenty years, and the same was acquiesced in by the owner of the servient estate, a prescriptive right was thereby gained. The learned author as authority for this statement cites *Ashley v. Ashley* (4 Gray, 197). It depends on quite other considerations. It appeared that when a deed of certain land was delivered to the defendant, the grantor's agent stated it reserved no right of way to her own lot, and the defendant replied that she might pass over the land as much as she pleased, "as much as if the right of way was in the deed;" and the user having thereafter continued twenty years, this evidence was admitted, as having a tendency to show that the plaintiff used the way openly, as of right, against the owner of the soil, and so was adverse. *La Frombois v. Jackson* (*supra*) is to the effect that an entry under color of title will be adverse, however groundless the supposed title may be, while possession, without claim of title, will never confer a title on the possessor. In *Briggs v. Prosser* (*supra*), the defendant, for the purpose of showing adverse possession, offered to show that he was in under con-

\* 82 N. Y. 265.



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tract for the conveyance of land, the price of which had been fully paid, so that he was in equity the owner, and also to show declarations of the plaintiff to the effect that he had sold the premises to the defendant, and that they belonged to him; and all this for the purpose of establishing an adverse possession. It was held proper for that purpose, because the defendant was equitably entitled to a deed, and there was nothing in the character of the possession under it inconsistent with the idea of an adverse possession. Whether it were adverse or not, the court say "would depend upon the circumstances of each particular case." In both cases, possession was taken under a contract for a deed, and it was held, and nothing more, that this did not *per se* necessarily preclude the adverse character of the subsequent possession. In the case before us there was no contract for a deed, or any engagement to confer a title. The cases are not in point. In all, there was an equitable title and a claim of right; and in each of the last two, an agreement for a deed. In all, an obvious intention to claim the title and a possession inconsistent with the plaintiff's ownership. As I have above undertaken to show, the possession of the plaintiff here was under no claim of right, and was entirely consistent with the defendant's title. The plaintiff's enjoyment was permissive, and he had no title, either in law or equity.

It is clear that the defendant, in the acts complained of, has gone no further than to exercise his legal rights. Of these he should not be deprived, unless he has acted in such a way as to make it fraudulent for him to set them up. There is no finding to that effect; nor would the evidence warrant such conclusion. The plaintiff has made out no case against this appeal; and the judgments of the General and Special Terms should therefore be reversed and a new trial granted, with costs to abide the event.

All concur, except EARL, J., dissenting.

FINCH, J., concurring in result.

Judgment reversed.

## Statement of case.

JOSEPH LEONARD, Administrator, etc., Respondent, v. THE COLUMBIA STEAM NAVIGATION COMPANY, Appellant.

The construction put upon the statutes of another State by its courts are controlling in the tribunals of this State.

An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State through the negligence of the defendant, where it appears that the laws of that State are similar to those of this State, giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same.

*It seems*, however, that the existence of such statutes in the other State must be proved; it cannot be presumed.

An administrator appointed in this State may maintain the action without showing that letters of administration have been taken out in the State where the death occurred.

*Richardson v. N. Y. C. R. R. Co.* (98 Mass. 85), *Woodward v. M. S. & N. I. R. R. Co.* (10 Ohio St. 121), *Needham v. G. T. R. R. Co.* (88 Vt. 295), *Allen v. P. & C. R. R. Co.* (45 Md. 41), *S. R. & D. R. R. Co. v. Lacy* (43 Ga. 461), *Marcy v. Marcy*, (32 Conn. 308), distinguished.

Letters of administration granted by a surrogate in this State, where the intestate died leaving assets in his county, are conclusive as to his authority to bring such action.

Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal.

(Argued January 19, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made February 6, 1880, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for alleged negligence causing the death of plaintiff's intestate.

The facts appear sufficiently in the opinion.

*Dennis McMahon* for appellant. The motion to dismiss should have been granted because the statutes of Connecticut do not give any right of action to the representative for pecuniary injuries sustained by the next of kin in consequence of death by wrongful act, except in the single instance of death

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occasioned by negligence of railroad companies. (R. S. of Conn. [ed. 1875], 488, § 3.) An administrator appointed in this State cannot recover in the courts of this State for damages caused by the death of his intestate, she having died in Connecticut. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 476-480; *Richardson v. N. Y. C. R. R. Co.*, 98 Mass. 85; 2 R. S. 73, § 23, p. 75; Edmonds' Ed. Gen. Stats. Mass. [1860], 701, § 34; Shearm. & Redf. on Neg. 294; *Woodward v. Mich. So. & Northern Ind. R. R. Co.*, 10 Ohio St. 120; Ohio R. S. 1860, 1139, chap. 87, § 636; 1 Ill. R. S. 1858, 422, § 1; Shearm. & Redf. on Neg. [1st. ed.] 337-8; *Needham, Adms. v. Grand T. R'way*, 38 Vt. 294; *State [case of Allen] v. Pittsburg R. R. Co.*, 45 Ind. 41; Purdon's Penn. Dig. 1872, p. 74, § 2; *Selma R. Co. v. Lacy*, 43 Ga. 461; *Mackay, Adms. v. Cent. R. R. Co. of N. J.*, 14 Blatchf. C. C. 75; *Marcy v. Marcy*, 32 Conn. 308; *Beach v. Bay State Co.*, 10 Abb. 71; S. C., 30 Barb. 433; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; S. C., 3 Bosw. 67; *Crowley v. Panama R. R. Co.*, 30 Barb. 99; *Sims v. Sims*, 75 N. Y. 466; *Whitford's Case*, 23 id. 481; 16 Alb. L. J. 643.)

*Christopher Fine* for respondent. The construction given by the courts of another State to the statutes of that State should control in our tribunals. (*Jessup v. Carnegie*, 10 N. Y. Dig. 150; N. Y. Court of Appeals, April, 1880; *Hunt v. Hunt*, 72 N. Y. 218; *Hoyt v. Sheldon*, 3 Bosw. 267; 5 id. 172.) This action was properly brought in the Supreme Court of the State of New York. (*Murphy v. The N. Y. & N. H. R. R. Co.*, 30 Conn. 184, 188, 189; *Same v. Same*, 29 id. 493, 499; *Soule v. The N. Y. & N. H. R. R. Co.*, 24 id. 575; *O'Rourke v. The People*, 3 Hun, 225; *Brown, Adms. v. The Buffalo & St. L. R. R. Co.*, 22 N. Y. 191.) The cause of action created in the State of Connecticut is in its nature transitory, and may be enforced in the courts of any State, or in any forum, unless the laws of that forum prohibit such an action. (Story on Conflict of Laws, §§ 538, 553, 554, 558; id., § 364 and note 6

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[6th ed.]; id., § 307, d and e [Torts]; 3 Blackst. Comm. 294; Comm. Dig., Action, 4; 1 Chitty on Com. & Mafg. 647-649; *Rafael v. Derelot*, 2 W. Black. 1058; *Robinson v. Bland*, 2 Burr. 1077; 1 W. Black. 259; Stevens' Pleadings, 3; Bouv. Law Dict., Actions and Real Actions; Bouv. Law Dict., Actions and Personal Actions; 2 Johns. Cas. 335; 1 and 2 Caines, 374; 3 Serg. & R. [Penn.] 500; 1 Chitty's Pl. 243; *Smith v. Bull*, 17 Wend. 323; *Glen v. Hodges*, 9 John. 66, 69; *McIvory v. McCabe*, 26 How. 257; *Maloney v. Davies*, 8 Abb. 316; *Missina v. Belden*, 6 id. 165, 170, 174; *Smith v. Butler*, 1 Daly, 508; disaffirming *Maloney v. Davis*, 8 Abb. 316; *Stallknecht v. Penn. R. R. Co.*, 13 Hun, 451; Gen. Term, First Dept., March, 1878; *Vanderwerker v. The N. Y. & N. H. R. R. Co.*, 6 Abb. 239, 240, 241; *Beach, Adm'r. v. The Bay State Stmbt. Co.*, 18 How. 335, 337, 338, 339; *Whitford v. The Panama R. R. Co.*, 3 Bosw. 67, 71, 84; 23 N. Y. 465; *Crowley v. Panama R. R. Co.*, 30 Barb. 99, 107; *McDonald v. Mallory*, 77 N. Y. 547; *Stout v. Wood*, 1 Blackf. [Ind.] 71, 72; *Wall v. Haskins*, 5 Ired. Law [N. C.], 177, 179; *Shipp v. McGraw*, 3 Murphy [N. C.], 463; *Madrazo v. Willis*, 3 B. & Ad. 353; *Mastyn v. Fabrigas*, 1 Smith's L. Cas. 765, 774, 777, 779, 781; *Melan v. The Duke de Fitz James*, 1 Bos. & Pull. 138.) The letters of administration granted to the plaintiff by the surrogate of the county of New York are conclusive of the plaintiff's right to bring this action and are all that is necessary. (3 R. S. 87, § 90 [6th ed.]; *Belden v. Meeker*, 47 N. Y. 310; *S. C.*, 2 Lans. 473; *Parham v. Moran*, 4 Hun, 718; *Leland v. Manning*, id. 11; *Hackney v. Vroom*, 62 Barb. 653; *Sibley v. Waffle*, 16 N. Y. 185; *Christy v. Libby*, 2 Daly, 423; *Roderigas v. E. R. Svgs. Inst.*, 63 N. Y. 460, 463, 464, 468, 471; *Richardson, Admr. v. West*, 10 N. Y. Weekly Dig. 65; Ct. of App., decided February 24, 1880; 3 R. S. 76, § 24 [23], sub-div. 3 and 4 [6th ed.]; *Potter v. Merchants' Bk.*, 28 N. Y. 652, 653, 654; *Lewis v. Penfield*, 39 How. 493, 494; *The People ex rel. Draper v. Pinkerton*, 77 N. Y. 245; *Stalknecht v. The Penn. R. R. Co.*, 13 Hun, 451; *Kansas Pac. R. R. Co. v. Cutter, Adm'r*, 16 Kans.

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568, 570; *Jeffersonville, M. & I. R. R. Co. v. Hendrick*, 41 Ind. 48, 69, 72, 75; 3 R. S. 89, 90, § 6, sub-div. 8 [6th ed.]; *Whitford v. The Panama R. R. Co.*, 23 N. Y. 468.) When a resident of one State owns property in a foreign State, upon his decease its distribution must be governed by the laws of the locality where the deceased was domiciled. (*Parsons v. Lyman*, 20 N. Y. 105; *Vroom v. Van Horn*, 10 Paige, 549; *Isham v. Gibbons*, 1 Bradf. 70; *St. Jurgo v. Dunscomb*, 2 id. 105; Story on Conflict of Laws, 403, 404, 437, 438.) Where a clause is inserted in a judgment without authority, the proper remedy is by motion to correct the judgment, not by appeal. (*The People v. Goff*, 52 N. Y. 434, 437; *Kranshaar v. Meyer*, 72 id. 602; *De Lavallette v. Wendt*, 75 id. 582; *Bush v. Remsen*, 34 id. 385; *Benisse v. Wood*, 37 id. 532; *Marble v. Lewis*, 53 Barb. 385; *The Mayor v. Lyons*, 24 How. 280.)

MILLER, J. The intestate was killed by reason of the explosion of a boiler of a steamer within the boundaries of the State of Connecticut, which the jury found was occasioned by the negligence of the defendant, who was the owner thereof. The statutes of that State created a cause of action in favor of and for the benefit of the next of kin and heirs at law, in certain cases which are enumerated. By the Revised Statutes (ed. of 1875), section 3, page 488, a right of action is given to the representatives of a person killed by the negligence of any railroad company or its servants, to recover damages to the amount of \$5,000. The common-law rule as to actions for injuries to the person is changed, and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason of death, and that the executor or administrator may prosecute the same, and that all actions for injuries to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. (Stats. of Conn. [revision of 1875], chap. 6, title 19, §§ 8-9.) It is held that under these provisions of the statutes of Connecticut an action lies in that State in favor

of the representatives of a deceased party to recover damages. (*Murphy v. N. Y. & N. H. R. R. Co.*, 30 Conn. 184; *S. C.*, 29 id. 496; *Soule v. N. Y. & N. H. R. R. Co.*, 24 id. 575.) The construction thus placed by the courts of another State upon the statutes of that State should be followed, and is controlling in the tribunals of such State. (*Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 id. 218.)

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory (Bouv. L. Dic., Personal Actions, Transitory Actions); and these actions may be brought anywhere, and are governed by the *lex fori*. (Bouvier; Story on Conflict of Laws, § 307, *a. e.*) The cause of action which the statutes of Connecticut created is transitory in its nature, and, unless excepted from the general rule as to the place where such actions may be brought, can be enforced in the courts of this State or any other forum, provided the laws of that forum do not forbid its maintenance. In this State it is held that actions will lie for injuries to the person, committed outside of the territorial limits of the State. In *Smith v. Bull* (17 Wend. 323) it was decided that an action for an assault and battery, committed in the State of Pennsylvania, could be maintained in any Court of Common Pleas of this State. The rule, no doubt, is that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another State or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other State, and that the injured party could have recovered there had the action been brought in such State. The remedy in such cases is given by the courts of one country or State upon the principle of comity which is due by one sovereign State or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this State, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this State

but in a foreign country, unless it is proved that the laws of that country are of a similar character. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. The Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547.)

These decisions rest upon the principle that the statutes of this State can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other States or countries are similar to our laws. In *Whitford v. The Panama R. R. Co.* (*supra*), the injury was done in New Grenada. After considering the effect of the statute in a foreign country, DENIO, J., remarks: "Whatever liability the defendants incurred by the laws of New Grenada by the act mentioned in the complaint might well be enforced in the courts of this State, \* \* \* but the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them." The doctrine of this case is approved in *McDonald v. Mallory* (*supra*), and it is laid down by RAPALLO, J., that where the wrong is committed in a foreign State or country no action "can be maintained here without proof of the existence of a similar statute in the place where the wrong was committed." The rule here laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the State where the action is given by law or where it is brought, but merely requires that it should be of a similar import and character. The statute in this State is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle and possesses the same general attributes as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact, when there are similar statutes instead of the common law, the right to recover damages

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stands precisely the same as if the common law in both States relating to the subject prevailed.

The doctrine that an action will lie when the common law, or the statutes of different States or countries correspond, is sustained by numerous authorities. (*Madrazo v. Willes*, 3 B. & Ald. 353; *Melan v. Duke de Fitz-James*, 1 Bos. & Pul. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 Smith's Lead. Cas. 963; *Shipp v. McCraw*, 3 Murphy [N. C.], 463; *Wall v. Hoskins*, 5 Ired. Law [N. C.], 177; *Stout v. Wood*, 1 Blackf. [Ind.] 71.)

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death happening in the State of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other State courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. N. Y. C. R. R. Co.* (98 Mass. 85), the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different States were not of a similar nature and the common-law rule prevailed in Massachusetts. The case, therefore, is not analogous. In *Woodward v. Mich. So. & N. I. R. R. Co.* (10 Ohio St. 121), it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representative of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under the statute of Illinois, or whether an administrator appointed under the laws of Illinois might not maintain such action.

The question now presented is not fully considered, and therefore the decision has no force as a case in point. In



*Needham v. G. T. Railway Co.* (38 Vt. 295), the death occurred in the State of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In *Allen v. Pitts. & C. R. R. Co.* (45 Md. 41), there was no allegation that there was any statute in the State where the death was caused creating a cause of action, and it was held that, in the absence of any proof, there was no presumption in favor of a positive statute law of the State, but it must be presumed that the common law prevailed. The case therefore is not in point. In *Selma R. & D. R. R. Co. v. Lacy* (43 Ga. 461), the same general state of facts existed and the same rule was recognized. *Marcy v. Marcy* (32 Conn. 308) does not directly affect the question considered. From this review of the cases, it is manifest that the authorities cited do not sustain the position that this action cannot be maintained in this State under the circumstances existing, and we are of the opinion that the right of the administrator to bring the same is clear and beyond question. The letters of administration granted by the surrogate are conclusive as to his authority. (*Roderigas v. East River Savings Inst.*, 63 N. Y. 460; *Kelly v. West*, 80 id. 139.) The letters on their face show that the intestate died "leaving assets" in the State and in the county of New York, and this gave the surrogate of the county of New York jurisdiction. (3 R. S. [6th ed.] 76, § 24.) Nor was it essential, we think, that letters should have first been taken out in the State of Connecticut. Be that as it may, however, the letters issued by the surrogate are conclusive as to the right of the administrator to maintain this action. In regard to the question as to the right to recover interest, there is no evidence that the interest was added to the verdict upon the trial. It does appear, however, to have been inserted in the judgment, from the record before us. We may assume that it was added on the taxation of the costs and the question can only be properly reached by a motion to retax the costs or to correct the judgment at Special Term, and not by appeal. (See Code of Civil Pro., §§ 1346, 1349.) Where a clause is inserted in the judgment without authority the proper remedy is by motion to

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94 N. Y. 434) correct the judgment, and not by appeal. (*People ex rel. Oswald v. Goff*, 52 N. Y. 434; *Kraushaar v. Meyer*, 72 id. 602; *De Lavallette v. Wendt*, 75 id. 579.) There was no error in the refusal of the judge to charge any of the requests submitted to him by the defendant's counsel; and after a careful examination we are unable to discover that any error was committed by the judge in the various rulings as to the admissibility of evidence.

After full consideration, we think that the case was properly disposed of at the Circuit, and that the judgment should be affirmed.

All concur, except RAPALLO, J., absent, FOLGER, Ch. J., concurring in result.

Judgment affirmed.

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JOHN HART, as Administrator, etc., Appellant, v. THE HUDSON RIVER BRIDGE COMPANY at Albany, Respondent.

In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge when crossing it in the night. Defendant had placed gates over the footway on each end of the draw which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. M., a boy in defendant's employ, was called as a witness for it, and after testifying on cross-examination that he had been sent at times to pull down the gate, was asked if he told one B. on one occasion to pull it down. This was objected to and excluded. *Held*, no error. M. testified that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say in the presence of people at the draw, when the subject was discussed just after the splash in the water which he heard, that he saw the woman fall from the end of the bridge. One N. was called as a witness for plaintiff, who testified that he saw a boy among those gathered on the bridge after the draw was closed, but could not identify M. as the one. Plaintiff's counsel then offered to prove that the boy said he saw a woman fall off the bridge; this was excluded; *held*, no error; that the question as to the identity of M. with the boy whom N. saw was for the court to determine; also that

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the attention of M. was not called with sufficient particularity to the time, place, persons, etc., to lay a foundation for the impeaching evidence.

A civil engineer having experience in the erection of bridges, as a witness for defendant, was allowed to testify, under objection and exception, that it was not customary to have gates of any kind on draw-bridges. *Held*, no error; that it was competent for the defense to show that the bridge was constructed with extraordinary care.

The same witness was asked, on cross-examination, whether it was safe and proper to have draws with drop-gates across the footpath of a bridge when the draw was open; this was objected to and excluded. *Held*, no error; that it was a matter of opinion and not within the range of expert evidence.

The court charged that if the jury believed that the gate was not entirely closed, but the bottom of it was two and a half feet from the bridge floor, the plaintiff could not recover. *Held*, no error.

Upon the question of contributory negligence the court charged: "It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn," but the burden is upon plaintiff to satisfy you that there was no contributory negligence on the part of the deceased." *Held*, no error.

(Argued January 20, 1881; decided February 8, 1881.)

**APPEAL** from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendant, entered upon an order made December 4, 1880, overruling plaintiff's exceptions and directing judgment upon a verdict.

This action was brought to recover damages for the death of Jane Hart, plaintiff's intestate, alleged to have been caused by the defendant's negligence.

The claim of the plaintiff was that the deceased, in crossing upon the defendant's bridge over the Hudson river at Albany, fell from the footway through the open draw and was drowned. When last seen alive she was crossing a street bridge on her way to the river bridge, about 7 P. M.; about that time the draw was opened, when part way opened a splash was heard by the employees upon the draw "like something falling in the water." The body of the deceased was found in the river the next day. The bridge had a way for foot passengers on its south side with railings on each side. There were stop-gates across this footway at each end of the draw which were designed

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to be let down when the draw was opened and raised when it was closed. These gates were raised and lowered by windlasses. There was an established signal by whistles from the engine on the draw to indicate to those operating the gates when to close them.

The further facts pertinent to the questions discussed appear in the opinion.

*Amasa J. Parker* for appellant. The court improperly permitted Hilton to testify that it was not customary to have gates of any kind on draw bridges. (*Ernst v. Hud. R. Co.*, 39 N. Y. 61; *Kissenger v. N. Y. & Harlem Co.*, 56 id. 538.) The court erred in charging that if the jury believed that the gate was not entirely closed, but the bottom was two and a half feet from the bridge floor, the plaintiff could not recover. (*Dyer v. Erie R. R. Co.*, 71 N. Y. 228; *Twomley v. N. Y. Cent. Co.*, 69 id. 158; *Coulter v. Am. Mer. Co.*, 56 id. 585; *Buel v. N. Y. Cent. Co.*, 31 id. 314; *Eckert v. Long Island Co.*, 57 Barb. 560.)

*Samuel Hand* for respondent. The burden of proof was upon plaintiff and he was bound to show that the injury was occasioned by defendant's negligence. (*Hale v. Smith*, 78 N. Y. 480, 483; *Cordell v. N. Y. C. R. R. Co.*, 75 id. 330, 332; *Reynolds v. N. Y. C. R. R. Co.*, 58 id. 248; *Warner v. N. Y. C., etc., Co.*, 44 id. 463, 471; *Gaynor v. Old Col. R. R.*, 100 Mass. 208; *Murphy v. Doane*, 101 id. 466.) A gate, whose bottom was two and a half feet from the floor, was a sufficient guard. (*Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 312; *Dongan v. Transp. Co.*, 56 id. 7; *Gavin v. City of Chicago*, Alb. L. J., Jan. 8, 1881, p. 37; *Dows v. Rush*, 28 Barb. 157; *Grazer v. Steilwagen*, 25 N. Y. 315.) The exclusion of the hearsay evidence of what a boy said about seeing a woman falling off the bridge was proper. (*King v. N. Y. C. & H. R. R. Co.*, 72 N. Y. 609; *Loomis v. Western Turnpike Co.*, 32 id. 127; *Palmer v. Haight*, 2 Barb. 210; *Kimball v. Davis*, 19 Wend. 437; *Sprague v. Caldwell*, 12 Barb. 516; *Crounse v. Fitch*, 1 Abb. Ct. App. Dec. 475.)

MILLER, J. Several errors are alleged to have been committed upon the trial of this action, in the rulings of the judge in regard to the admission and exclusion of evidence, which demand consideration. Miller, a boy in defendant's employ, as a witness for it, testified in reference to the fact, that whistles were blown on the night of the accident for the gates and to turn the signals. Upon his cross-examination the question was put: "You have been sent out to tell Borst to put it (the gate) down;" and he answered: "I have been sent to pull it down." He was then asked: "Did you tell Borst, on one occasion, to put it down?" The defendant's counsel objected to the testimony, and it was excluded and an exception taken.

We think there was no error in the ruling of the judge. What the witness told Borst was not material, and could have no direct bearing upon the case. That he told Borst to pull it down would not add to the strength of any testimony given to prove that he had pulled it down himself. While it might be competent to show that it was up at any particular time, or times, and was pulled down, the declarations of the witness were not admissible for that purpose, as this fact could be proved quite readily, if true, without such declarations, and by higher and better evidence. It is not claimed that the declarations of the witness were admissible upon any other ground than that stated, and the evidence was properly excluded.

The offer to show by the witness, Neville, that the boy Miller said that he saw a woman fall off the bridge, was also incompetent. Miller had testified that he did not see a woman fall from the bridge and that he did not say, in the presence of people, at the draw, when the subject was discussed just after the splash in the water, which he heard, that he saw the woman fall from the end of the bridge; and the object of the evidence was to impeach his testimony. It was questionable from the testimony, whether the boy whose declaration it was proposed to prove was Miller. Neville could not identify him. The question, as to the identity of Miller with the boy whom Neville heard speak, was addressed to the judge; and that fact, as the case stood, rested with him to determine, before deciding as to

the admissibility of the testimony. As this was not clearly established, and could not properly be submitted to the consideration of the jury, it is manifest that the evidence was incompetent. Aside, however, from this view, we think that a sufficient foundation was not laid to authorize the question to be put. The evidence of Miller, denying that he had said so, was not enough to allow proof that it was said in the presence of Neville. The time and place, and the persons to whom, or in whose presence, the alleged statement was made, should have been brought to the attention of the witness who it was intended to impeach, before he can be contradicted. (*Kimball v. Davis*, 19 Wend. 437; *Palmer v. Haight*, 2 Barb. 210; *Sprague v. Cadwell*, 12 id. 516.) The offer made was very general, without any specification as to time or place, and we agree with the trial judge, that there was no sufficient foundation laid, upon which to predicate an impeachment. It should also be noticed that the final offer, before any exception was taken, was to show that the boy said he was on the draw at the time Miller swore he was on the draw, and hence the testimony offered might not tend to contradict him.

There was no valid objection to the question put to the witness, Hilton, whether it was customary to have gates of any kind on draw bridges, so far as he knew. The witness was a civil engineer, had experience in the construction of bridges, and superintended the building of defendant's bridge. It was therefore competent to show that the bridge was constructed with extraordinary care and circumspection, and with a view to the safety and security of those passing over it, even beyond what was customary in such cases. The evidence given could not affect the question, as to the right of foot passengers to rely upon the gates after they had been placed there, while passing across the bridge. Nor was there any error in refusing to allow Hilton to answer the question put to him, as to whether it was safe and proper to have draws with drop gates across the foot path of the bridge, when the draw was open. It was entirely a matter of opinion, not properly within the rule which allows the testimony of experts, and in regard to

which one individual could form a judgment as well as another, both having equal knowledge of the circumstances. It did not relate to any thing connected with the safety or the strength of the construction, but to a question of fact, which properly belonged to the jury to pass upon, and which could not be disposed of upon the opinions of witnesses.

Exceptions were also taken to the charge of the judge upon the trial, and it is claimed there was error in charging as requested by the defendant's counsel. Defendant's counsel requested the court to charge, that if the jury believed the gate was not entirely closed, but the bottom of it was two and a half feet from the bridge floor, the plaintiff cannot recover, and the judge so charged.

We discover no objection to this portion of the charge. It is difficult to see how a person, in the exercise of ordinary care, could be injured, when the gate was sufficiently lowered to prevent such person from passing along beyond such gate; and, under ordinary circumstances, the distance named would be quite as effectual as if it was much lower. It would require some effort to get under the gate, and, if it was done, would tend to establish contributory negligence on the part of the person so doing. If it was situated as stated, it was an effectual and a sufficient obstacle to prevent foot-passengers from walking off the bridge, and to guard against carelessness or mistake, and all that could have been required in the exercise of a proper degree of care and vigilance.

There is, we think, no ground for claiming that, with such a barrier in the way, the deceased could have been injured by striking her head against it, and being momentarily blinded by the collision, became confused, and, in her struggles, passed through the opening under the gate and into the water. The very fact of such a collision taking place, in the absence of any evidence, furnishes strong proof that a proper degree of care was not exercised on the part of the deceased. Unreasonable inferences are not to be assumed, to relieve a party, under such circumstances, from the charge of negligence, and the presumption of law is in a contrary direction.

The defendant was not bound, we think, to place an obstruction, or a warning in the way which rendered it absolutely impossible to pass; and it was sufficient to guard against danger, or accident, when a proper degree of vigilance was exercised. In regard to steamboats, where there is quite as much danger from accident, it has been held that a space of three feet between the railing and the deck does not constitute negligence. (*Dougan v. Champlain Trans. Co.*, 56 N. Y. 7; see, also, *Cleveland v. N. J. S. B. Co.*, 68 id. 312.)

Nor was there any error in that portion of the charge relating to contributory negligence, to which an exception was taken, which was as follows: "It is not enough to prove facts from which either the conclusion of negligence, or the absence of negligence, may be with equal fairness drawn, but the burden is upon the plaintiff, to satisfy you that there was no contributory negligence on the part of the deceased."

The question presented by the charge is, whether the burden was upon the plaintiff to establish that there was no contributory negligence. In *Hale v. Smith* (78 N. Y. 483), it is held, that in cases where contributory negligence may be claimed, it is incumbent upon the plaintiff to satisfy the jury by a preponderance of proof; and it is said by RAPALLO, J., "that the absence of contributory negligence is part of the plaintiff's case, and the burden of satisfying the jury upon that point rests upon him." This doctrine is also upheld in other cases. (See *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 471; *Reynolds v. N. Y. C. & H. River R. R. Co.*, 58 id. 248; *Cordell v. N. Y. C. & H. River R. R. Co.*, 75 id. 330.) Within this rule, we do not discover any valid ground of exception to the charge of the judge. As the evidence stood, there was no proof either way, and it was by no means clear, in the absence of evidence, that the deceased was not chargeable with contributory negligence. It was not sufficient that the evidence, in this respect, was equally balanced, and it was essential, that at least a *prima facie* case should be established.

Cases may arise where proof of the facts, of itself, shows that there was no contributory negligence; but where there is



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Statement of case.

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no evidence as to what actually did take place at the time and the proof is such as to render it uncertain in regard to that subject, it cannot be said that an absence of negligence is established, within the rule referred to. In such a case, no inference can legitimately be drawn in favor of the plaintiff, within the rule stated in *Powell v. Powell* (71 N. Y. 73).

Under the peculiar circumstances of this case, and without intending to lay down any general rule different from that which is already established by the authorities cited, or to apply such rule to other cases, we think the charge was not erroneous, and as no error appears, a new trial should be denied and the judgment affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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GEORGE E. PALMER, as Executor, etc., Respondent, v. THE  
PHENIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

Under the provision of the Code of Procedure (§ 427) authorizing the bringing of an action against a foreign corporation by "a resident of this State for any cause of action," *held*, that an action was properly brought in this State by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that State, the will having been admitted to probate in that State, and afterward, upon production to the surrogate of an authenticated copy having been admitted to probate in this State.

The policy acknowledged receipt of the first premium, and contained a condition avoiding it in case of non-payment of the annual premiums on or before the date they fell due. There was also a notice indorsed upon the policy to the effect that no receipts for premiums should be valid unless signed by the president or secretary, and that no agent had authority to alter a policy or to receive any premium after it became due "without special permission from the officers of the company." S., who was general agent of defendant for the State of Rhode Island, took the application for the policy in question in Connecticut. He took notes for the first premium, which contained a condition avoiding the policy if the amount was not paid when due; he forwarded the application to defendant, received the policy and delivered it to the insured. The

## Statement of case.

first note was not paid when due and the insured wrote to S., expressing inability to pay and asking to be relieved from liability. S. thereafter made a new agreement, taking new notes with longer time to run, the notes containing the same condition, printed forms furnished the agent by the company being used. S. informed the defendant of this arrangement and forwarded to it two of the notes; it made no objection, received the money on the first note falling due, which was paid at maturity, and retained the others until after the death of the insured. The second note not being paid at maturity, S. wrote to the insured, using paper with a printed heading furnished by the company, in which he was styled its general agent, asking for payment of the note by a day named, and this not having been complied with again wrote, asking the insured to send the amount "by return of mail or by express." On the day this letter reached the insured he inclosed the amount in bank bills in a letter addressed to S. at his place of residence, which he mailed in time for a mail leaving the same day, although not the first mail after the receipt of the letter. The letter, with its contents, never was received by S. In an action upon the policy, *held*, that the condition and notice had no reference to the first premium, but only to subsequent ones, and so placed no restrictions upon the power of S. as to the notes taken by him, and in the absence of any notice of a limitation upon his authority as general agent the insured had a right to suppose he could extend the time and prescribe the mode of payment, and that payment in the mode prescribed was binding upon the defendant; that the direction in the letter of S., to send by return mail, did not require the answer to be sent by the first return mail; that the insured was entitled to a reasonable time for compliance before he could be put in default; and that the letter with money was mailed in time.

(Argued January 21, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 14, 1880, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

*Samuel Hand* for appellant. The claim was *bona notabilia* in the place where the parties reside, and not under any possible view assets due or collectible in this State. (*Been v. Sherman*, 73 N. Y. 299; *Holcomb v. Phelps*, 16 Conn. 136; *Abbott, Adm'r, v. Coburn*, 28 Vt. 670; *Burbank v. Payne*,

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17 La. Ann. 15; *Sawyer v. Ins. Co.*, 46 Vt. 697; *Lewis v. Union Ins. Co.*, 97 U. S. 682; *Smith v. Mut. Ins. Co.*, 14 Allen, 336; *Camden Co. v. Sneed Co.*, 36 N. J. L. 15; *Bullock v. Rogers*, 16 Vt. 323; 2 Redfield on Wills, 21; *Doolittle v. Lewis*, 7 Johns. Ch. 47; Story's Conflict, §§ 513, 518; *Boston v. Boylston*, 2 Mass. 384; *Stone v. Scripture*, 4 Lans. 186; *Merrill v. N. E. Ins. Co.*, 103 Mass. 245; Wharton's Conflict of Laws, § 634; *Herdenberg v. Herdenberg*, 46 Conn. 23; *Sayre v. Coley*, 1 Redf. 409; *Parsons v. Lyman*, 20 N. Y. 103.) The referee erred in his conclusion, that the policy of insurance was in full force at the time of the death of the assured. It was clearly forfeited by the failure to pay the three months' note. (*Mersereau v. Phoenix Ins. Co.*, 66 N. Y. 274; *Catoir v. Am. Ins. Co.*, 33 N. J. L. 487; *Baker v. Life Ins. Co.*, 43 N. Y. 282; *Pitt v. Berkshire Ins. Co.*, 100 Mass. 500; *Wall v. Home Ins. Co.*, 36 N. Y. 167; *Roehner v. Knickerbocker Life*, 63 id. 160.) The acts of Skinner, the local agent, did not amount to a waiver of the payment of the note when it became due. (*Mersereau v. Phoenix Ins. Co.*, *supra*; *Rodgers v. Insurance Co.*, 2 Lans. 480; *Franklin Ins. Co. v. Sefton*, 6 Ins. Law J. 95; *Diboll v. Aetna Ins. Co.*, 9 id. 827.) An agent to have had power to waive a forfeiture in this case must have had special power from the company. (*Wall v. Home Ins. Co.*, *supra*; *Busbey v. N. Am. L. Ins. Co.*, 4 Ins. L. R. 116; *Evans v. N. Y. L. Ins. Co.*, 5 id. 335.) Courts will not extend the power of the agent by implication in fraud of the company and for the benefit of the insured. (*Ryan v. The World Mut. L. Ins. Co.*, 41 Conn. 168; *Mersereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 274; *Davis v. Mass. M. L. Co.*, 13 Blatchf. 162.) The sending of the money by mail would not amount to a payment unless sent as directed by Skinner by the first return mail. (*Averill v. Hedge*, 12 Conn. 424.) The address of the letter was not good, because it did not state the number of the street. (*Wall v. Haynes*, 4 Ryan & M. 149; 2 Parsons on Contracts, 621, note.) As the pleadings stand proof of waiver could not supply the want of evidence of performance. (*Berhard v. Washington L. Ins. Co.*,

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5 Life & Acc. Ins. R. 143; *Kelsey v. Western*, 2 Comst. 506; *Field v. Mayor, etc.*, 2 Seld. 179.)

*E. Bartlett* for respondent. There can be no question as to the jurisdiction of the court. (Code of Procedure, § 427; *Gibbs v. Queens Ins. Co.*, 63 N. Y. 114; *Prouty v. Mich. South. & N. Y. R. R. Co.*, 4 N. Y. Sup. Ct. [T. & C.] 230; *Root v. Gt. West.*, 1 id. 10.) Nothing in the notice, indorsed on the policy, can be construed as a notice to Dr. Palmer that Mr. Skinner had no power to waive the forfeiture clause contained in the note. (Bliss on Life Ins. 487; *Miller v. Brooklyn Life Ins.*, 12 Wall. [U. S.] 288; *Mersereau v. The Phoenix Life Ins. Co.*, 66 N. Y. 274.) A general agent has power to waive a forfeiture. (*Carroll v. Charter Oak*, 10 Abb. [N. S.] 166; *Hotchkiss v. Germania*, 5 Hun, 96; *Lightbody v. N. Am.*, 23 Wend. 18; *Leeds v. Mechanics*, 8 N. Y. 351; *Post v. Etna*, 43 Barb. 351; *Thompson v. Am. Tontine*, 46 N. Y. 674; *N. Y. Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468; *Wood v. Poughkeepsie Ins.*, 32 N. Y. 619; *Sheldon v. Atlantic Fire & Marine*, 26 id. 460; *Onendorf v. Beardsley*, 23 Barb. 656.) Mr. Skinner's acts, after maturity of the note, amounted to a waiver of the forfeiture. (Bliss on Life Ins. 452, § 272; *Viele v. Germania*, 26 Iowa, 9; *Bouton v. American*, 25 Conn. 542; *Boehm v. Williamsburg*, 35 N. Y. 131; *Norton v. Knickerbocker Life*, 6 Otto, 234; *Miller v. Brooklyn Life*, 12 Wall. 285; *Vial v. Genesee*, 19 Barb. 440; *Washoe Tool Co. v. Hibernia*, 7 Hun, 75; affirmed, Ct. of App., 66 N. Y. 613; *Goit v. National*, 25 Barb. 190; *Bodine v. Exchange*, 51 N. Y. 117; *Mut. Ben. v. French*, 2 Cin. 321; *French v. Mutual*, 30 Ohio, 240; *Sheldon v. Atlantic*, 26 N. Y. 460; *Trevor v. Colgate*, id. 307.)

EARL, J. This is an action upon a policy of insurance issued by the defendant, a Connecticut corporation, upon the life of plaintiff's testator, who resided and died in that State. He left a will in which the plaintiff, a resident of this State, was named as executor. The will was proved and admitted to

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probate in that State, and afterward, upon the production to the surrogate of the county of New York of a properly authenticated copy of the will from the Probate Court of Connecticut, the will was admitted to probate, and letters testamentary were by him issued to the plaintiff. . The plaintiff afterward commenced this action, making service of the process in this State, and the defendant appeared therein and answered the complaint.

No point is made that the surrogate of New York did not have jurisdiction to grant the letters to the plaintiff, or that the Supreme Court did not obtain and have jurisdiction over the defendant. But it is contended that the Supreme Court did not have jurisdiction over the subject of the action. We are of opinion that it did have.

The Code of Procedure, which was in force when this action was commenced, provided, in section 427, that an action might be brought against a foreign corporation by "a resident of this State for any cause of action." The plaintiff was a resident of this State, and therefore, but for the fact that he sued in his representative capacity, there could be no question as to his right to sue the defendant for the cause of action alleged in the complaint. But the fact that he sues as executor can make no difference. He nevertheless was a resident of this State, and therefore within the description contained in the statute. After the plaintiff took out letters in Connecticut, by virtue of them and the will he became vested with the legal title to this policy of insurance, and he owned it everywhere, in this State while here, as well as in the State of Connecticut. Here he could have received payment from the defendant, and could have discharged the policy. (*Parsons v. Lyman*, 20 N. Y. 103; *Middlebrook v. Merchants' Bank of N. Y.*, 3 Abb. Ct. of App. Dec. 295.) But he could not have sued to enforce payment without letters issued to him in this State. Letters here were not needed to give him title to the policy, but simply to give him a standing in our courts to enforce payment of the same. The plaintiff thus owned the policy, was a resident of this State, and had the right to sue the defendant; and we are unable to

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perceive any reason, or to find any authority for holding that the Supreme Court did not have jurisdiction of both the parties and the subject of the action.

The further point is made, that the policy became void in the life-time of the assured, on account of facts now to be stated. The policy was issued January 15, 1868, and the assured died on the 8th day of May thereafter. The annual premium to be paid was \$554.50. The policy contained a condition that "if the said premiums shall not be paid at the office of the company, in the city of Hartford, Conn., or to an agent of the company, on his producing a receipt, signed by the president or secretary, on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease;" and also, on the back thereof, a notice that "no receipt for premiums on this policy is valid unless signed by the president or secretary of the company at Hartford, Conn., and that no agent has authority to interline, alter or otherwise change any policy, or to receive any premium after date of its being due, without special permission from the officers of the company." About January 1, 1868, P. Skinner, Jr., was appointed an agent by the defendant for the purpose of procuring and effecting insurance on lives, and securing applicants for insurance who should be satisfactory to the company, and for the purpose of collecting and paying over premiums on such insurance, when effected. The district assigned to him as such agent, and which was expressly "to be under his exclusive control," was to embrace the entire State of Rhode Island, and he was "to act exclusively for said company, so far as to tender to it all risks obtained by him or under his control."

Skinner went to Stonington, in the State of Connecticut, and there took the application for the insurance in question. Instead of receiving cash for any part of the first premium, he took the note of the assured, at twelve months, for \$277 and interest, and another note, at thirty days, for \$278.50, which was the balance of the premium, including one dollar for the policy fee. He forwarded the application to the company, giv-

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ing the assured what was called a "binding receipt," which was subject to the decision of the medical examiner at the home office, and was binding until rejected. He afterward received the policy from the company and delivered it to the assured. The notes were dated January 15, 1868. The note for thirty days was not paid when it fell due and was protested. That note contained a provision "that if the amount of this note shall not be paid when due, the said policy shall be null and void." The assured then wrote to Skinner, expressing his inability to pay the note, and requesting to be relieved from his responsibility. After that, Skinner saw him and made a new agreement with him as to that note. He left the note for twelve months outstanding and took the assured's three notes for \$69 each, at three, six and nine months from January 15, and a fourth note for the balance at ten days, which was paid at maturity. The three notes contained the same provision above stated, as contained in the note for thirty days, and were from printed forms furnished to the agent by the company.

After taking these notes under the new arrangement, Skinner informed the company of what he had done, and forwarded to it the two notes for six and nine months, and also either forwarded to it the note for three months or retained it for collection, and it, knowing what he had done, made no objection. It received the cash paid on the note for ten days and retained the notes for six, nine and twelve months until after the death of the assured.

The note for three months was not paid at maturity. On the sixteenth day of April, Skinner, using paper furnished to him by the company, with a printed heading in which he was styled its general agent, wrote to the assured, asking payment of the note by the twenty-fifth day of that month. On the seventh day of May, under a similar heading, he again wrote him as follows: "You will confer a great favor if you send by return of mail, or by express, the amount of quarterly premium, already past due on your policy of insurance, so that I can make my return to home office. The amount is \$69. Please forward the same, and very much oblige." That letter

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reached the assured at Stonington on the eighth day of May, soon after nine o'clock. He was then quite ill. He took \$69 in bills and inclosed them in a letter addressed "P. Skinner, Providence, R. I.," and caused the letter to be placed in the post-office at four o'clock P. M., in time for the mail which left Stonington for Providence at six o'clock P. M. of that day, missing the mail which left Stonington for Providence at half past one P. M., the only prior mail after nine o'clock. The assured died at nine o'clock P. M. of the same day, and the letter, with its contents, did not reach its destination, and was never afterward heard of by any of the parties interested. The company now claims that the policy was forfeited by the failure to pay the note for three months.

The condition and notice contained in the policy, as recited above, have no reference to the first premium, payment of which is acknowledged in the policy, but, clearly by the language used, have reference to subsequent premiums to be paid, and hence placed no limitations upon the power of Skinner as to the notes taken by him. When the thirty days note fell due the company could, by its terms, have claimed the forfeiture caused by the non-payment thereof. But that it did not do; it waived that forfeiture and entered into a new agreement. Again, when the note for three months fell due, the company could have claimed a forfeiture of the policy; but it did not do so. Skinner was held out to the assured as one having authority to act as general agent of the company. In his dealings with these notes there was no limitation in his authority, at least none known to the assured. His act in waiving the forfeiture, on account of the failure to pay the thirty days' note, was sanctioned by the company. The assured dealt with Skinner in making and giving the new notes. This note was in Skinner's hands for collection as general agent, and, in the absence of any notice of any limitation upon his authority, the assured had the right to suppose that he could extend the time of payment and prescribe the mode of the payment thereof, and thus waive the performance of a condition which he had imposed in taking the note. Without now referring to the evidence



in greater detail, we concur with the learned referee, for reasons more fully stated in his opinion, that the assured had the right to suppose, when he posted his letter with the money to Skinner, on the eighth day of May, that his policy was then in force; that Skinner was then authorized to receive payment of the money upon the note, and to treat the policy as valid. Payment by the assured, in response to the letter of Skinner, could not therefore be repudiated by the company. But it is said that payment was not made as directed in Skinner's letter, and that therefore it was ineffectual. The assured was requested to send the amount of the note by mail or express. It cannot be denied that he sent it by mail, as requested. If he sent it as requested, it was at the risk of the company. But it is said that the letter was not properly directed. There were no particular directions in Skinner's letter, as to how the letter of the assured should be addressed. There was no proof that there was in Providence any other person by the name of P. Skinner, except defendant's agent. It does not even appear that there was a person known as P. Skinner, senior. Hence, it cannot be said that the letter was misdirected, or that it failed to reach its destination on that account.

It is further contended that the money letter was not mailed in time for the return mail at 1:30. The request in Skinner's letter was not that the money should be sent by the first return mail, and no one receiving such a letter residing in a city where there were several mails every day, would so understand it. It cannot be supposed that Skinner meant the money should be sent to him by the first return mail or he would not receive it, and then insist upon the forfeiture of the policy. After the receipt of the letter, the assured was entitled to a reasonable time in which to comply, before he could be so put in default as to cause a forfeiture of his policy. Taking into consideration all the circumstances, we think that the money letter was mailed in time to comply with Skinner's request.

We are, therefore, of opinion that the action was not well defended, and that the judgment should be affirmed, with costs.

All concur; except RAPALLO, J., absent.

Judgment affirmed.

## Statement of case.

EUNICE L. ROOT, as Executrix, etc., Respondent, v. THOMAS R. WRIGHT, Impleaded, etc., Appellant.

A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made.

Defendant W. was liable as second indorser of a note upon which one F. was primarily liable. F. was also otherwise indebted to W. F. was the owner of certain land upon which C. had a mortgage, and upon which plaintiff had a prior mortgage. C. proposed that W. should take an assignment of his mortgage, and that F. should execute to W. a deed of the land as security for the payment of the sum he should advance to C. and for his liability as indorser; this was assented to by W., and F. and the parties went to the office of an attorney for the purpose of employing him to draw the necessary papers and to consummate the proposed arrangement. A deed of the land was then executed to W., containing a covenant by which he assumed and agreed to pay plaintiff's mortgage. In an action to foreclose said mortgage plaintiff sought to make W. liable for any deficiency, he claiming that the arrangement was changed at the attorney's office, and it was then agreed that F. should convey the land absolutely. To prove this, plaintiff called the attorney, who was permitted to testify, under objection and exception, to the conversation between the parties when the deed was drawn. *Held* error; that the communications so made were privileged.

The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment.

Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule prohibits him from testifying to such communications in an action between his clients and a third person.

(Argued January 24, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made June 26, 1880, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 21 Hun, 344.)

## Statement of case.

This action was brought to foreclose a mortgage executed by defendant George Foster, to plaintiff's testator. Subsequent to the execution of the mortgage Foster conveyed the premises to defendant Wright, by deed absolute on its face, containing a covenant by which Wright assumed and agreed to pay the mortgage. Plaintiff asked a personal judgment against Wright for any deficiency; Wright contested this liability, claiming that the deed to him was intended simply as a mortgage.

The further facts pertinent to the questions discussed appear sufficiently in the opinion.

*S. N. Dada* for appellant. The referee erred in receiving the testimony of the attorney as to what occurred in his office August 10, 1874, when Foster, Wright and Crosby were present, such communications being privileged. (Code Civil Pro., § 835; *Williams v. Fitch*, 18 N. Y. 550; *Bk. of Utica v. Mersereau*, 3 Barb. Ch. 595; *Parker v. Carter*, 4 Munf. 273; *Whitney v. Barney*, 30 N. Y. 330; *Britton v. Lorenz*, 45 id. 51; *Yates v. Olmstead*, 56 id. 632; *Bacon v. Frisbie*, 10 N. Y. Wkly. Dig. 134.) The conveyance to Wright, though an absolute deed in form, being in fact only a mortgage and never having been accepted by defendant Wright with knowledge that it contained the assuming clause, no personal judgment could have been rendered against defendant for any deficiency. (Thomas on Mortgages, 192; 61 N. Y. 471; 22 id. 438, 439; Chan. [2d ed.] 478; 8 Wend. 234; 2 id. 318; *Richard v. Sanderson*, 41 N. Y. 179; 46 id. 605; 52 id. 251; 68 id. 499; *Gurnsey v. Rogers*, 47 id. 241; *Vrooman v. Turner*, 69 id. 280; *King v. Whitley*, 10 Paige, 464; *Trim v. March*, 54 N. Y. 599.)

*Howe & Rice* for respondent. A mortgagor who is personally liable to the mortgagee for the payment of the debt secured by the mortgage, but who has parted with all his interest in the mortgaged premises, while a proper party is not a necessary party to a bill to foreclose the mortgage, even where a mere surety is sought to be held for the deficiency. (*Drury*

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v. *Clark*, 16 How. 424; *Bigelow v. Bush*, 6 Paige's Ch. 343; *Cherry v. Monroe*, 2 Barb. Ch. 618, 627; *Gilbert v. Averill*, 15 Barb. 20.) The deed from Foster and wife to Wright contained in its assuming clause what was equivalent in law to a covenant on the part of Wright to pay the mortgage debt, due from Foster to Root. (*Russell v. Pistor*, 7 N. Y. 171; *Brother v. Hughs*, 12 id. 74; *Lawrence v. Fox*, 20 id. 268; *Belmont v. Coman*, 22 id. 438; *Hartley v. Harrison*, 24 id. 170; *Burr v. Beers*, 24 id. 178; *Rickard v. Sandersen*, 41 id. 179; *Vrooman v. Turner*, 69 id. 280; *Comstock v. Drohan*, 71 id. 9; *Albany City Savings Institution v. Burdick*, 20 Hun, 88.) The referee properly found as matter of fact that there was no mistake in the deed. (*Long v. Warren*, 68 N. Y. 426; *Irving Nat. Bk. v. Myers*, 21 Alb. L. J. 74; *Moran v. McLarty*, 75 N. Y. 25; *Upton v. Tribilcock*, 91 U. S. 50; *Alb. Sav. Inst. v. Burdick*, 27 N. Y. Sup. Ct. 104.) Under the pleadings the defendant was not in a position to show a mistake in the deed. (6 Wait's Pr. 169-177; *Wells v. Yates*, 44 N. Y. 525; *Bryce v. Lorillard-Fire Ins. Co.*, 55 id. 240; *Bush v. Hicks*, 60 id. 298; *Andrews v. Gillespie*, 47 id. 487; *Paine v. Jones*, 75 id. 593; *Heelas v. Slevin*, 53 How. 356.) Evidence of the attorney who drew the conveyance from Foster to Wright was properly received. (*Brandt v. Klein*, 17 Johns. 335; *Coventry v. Tannahill*, 1 Hill, 33, 36, 40; *Whiting v. Barney*, 30 N. Y. 330; *Britton v. Lorenz*, 45 id. 51, 57; *Hebberd v. Haughain*, 70 id. 54, 61, 62; *Mullford v. Muller*, 3 Abb. Ct. of App. Cases, 330.)

ANDREWS, J. The liability of the defendant for the deficiency arising on the sale of the mortgaged premises turned upon the question, whether the deed from Foster was intended as an absolute conveyance, or simply as a mortgage. If it was intended as a security merely, the covenant thereon to assume and pay the plaintiff's mortgage was in effect an agreement between Foster and the defendant that the latter should advance the amount of the prior lien upon the security of the land, and gave no right of action to the plaintiff, who was neither a

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party to the contract nor the person for whose benefit it was made. (*Garney v. Rogers*, 47 N. Y. 241; *Pardee v. Treat*, 82 id. 385.) The referee found that the deed was intended as an absolute conveyance, and to establish this view of the transaction, the plaintiff on the trial, called as a witness, the attorney who drew the deed, who was permitted, against the objection of the defendant, to testify to the conversation between Crosby, Foster and the defendant Wright, at his office, when the deed was drawn. The evidence of the attorney (who is also the attorney for the plaintiff in this action) was material upon the point in controversy. The general facts are, that on the morning of the day when the deed was drawn, and before the conversation at the attorney's office, Crosby, Foster and Wright had an interview. Foster was the owner of the land embraced in the plaintiff's mortgage, and the mortgagor. Crosby held a junior mortgage on the same premises, which was due. Wright was liable as second indorser of a note upon which Foster was primarily liable, and Foster was also indebted to him for money advanced. Crosby was urging the payment of his mortgage, and at the interview between Crosby, Foster and Wright, it was proposed by Crosby, that Wright should take an assignment of his mortgage, and that Foster should execute to Wright a deed of the land as security for the payment of the sum he should advance to Crosby, and for his liability as indorser. This proposition was finally assented to by Wright and Foster, and the three persons, by mutual agreement, then went to the office of the attorney to consummate the proposed arrangement. The arrangement, as the attorney testifies, was there changed, and his evidence tends to show that it was agreed that Foster should convey to Wright by an absolute and indefeasible deed, and that Crosby, instead of assigning, should satisfy his mortgage upon payment thereof by Wright. The attorney was contradicted on material points by other witnesses, and the question is, whether the evidence of the attorney in respect to the transaction at his office was admissible.

The referee found that Wright, Foster and Crosby, after making the verbal agreement, went to the law office of the

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attorney, for the purpose of employing him professionally to draw the necessary papers to carry out that agreement, and that on the agreement being stated to him, it was changed by his advice. The rule that an attorney cannot disclose communications made to him by his clients is not, as now understood, confined to communications made in contemplation of, or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. (*Williams v. Fitch*, 18 N. Y. 550; *Yates v. Olmsted*, 56 id. 632.) The rule prohibiting such disclosure still exists, notwithstanding the change in the law permitting a party to an action to be examined as a witness on his own behalf, or at the instance of the adverse party, and is made a part of the statute law by section 835 of the Code of Civil Procedure. It is not necessary, in this case, to consider the question, whether an attorney, employed as the common attorney of two or more parties to give advice in a matter in which they are mutually interested, can, on a litigation subsequently arising between them, be examined at the instance of one of the parties, as to communications made when he was acting as the attorney for both. (See *Whiting v. Barney*, 30 N. Y. 330.) However this may be, we are of opinion that he cannot disclose such communication in a controversy between such parties and a third person. Where parties, having diverse or hostile interests or claims which are the subject of controversy, unite in submitting the matter to a common attorney for his advice, they exhibit, in the strongest manner, their confidence in the attorney consulted. The law should encourage, and not discourage, such efforts for an amicable arrangement of differences, and public policy and the interests of justice are subserved by placing such communications under the seal of professional confidence to the extent at least of protecting them against disclosure by the attorney at the instance of third parties. This position, if not directly adjudicated, is supported by the opinions of judges in several cases. (*Rice v. Rice*, 14 B. Monr. 417; *Robson v. Kemp*, 4 Esp. 233; *Same v. Same*, 5 id. 52; *Strode v. Seaton*, 2 Ad.

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& El. 171; see, also, opinions of GROVER, J., in *Britton v. Lorenz*, 45 N. Y. 57; INGRAHAM, J., in *Whiting v. Barney*, 30 id. 342; SMITH, J., 38 Barb. 397.)

For the error in admitting the evidence referred to, the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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ALICE McCOSKER, Administratrix, etc., Respondent, v. THE  
LONG ISLAND RAILROAD COMPANY, Appellant.

McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable.

*McCosker v. L. I. R. R. Co.* (21 Hun, 500), reversed.

(Argued January 25, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made July 1, 1880, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 21 Hun, 500.)

This action was brought to recover damages for alleged negligence causing the death of John McCosker, plaintiff's intestate.

These facts were stipulated on the trial —

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*"First.* That John McCosker, plaintiff's intestate, was, at the time of his death, in the employ of the defendant as a driller in and about the defendant's yard at Hunter's Point. That the duties of said McCosker as such driller were to assist in the making up of trains, and the distribution of cars in and about the said yard and repair shops of the defendant.

*"Second.* That said McCosker had been hired by and was under the immediate supervision and control of Rodney W. Luke, the yardmaster.

*"Third.* That the duties of said Luke included the hiring and discharging of drillers, the making up of trains and the distribution of cars in and about the said yard and the repair shops of the defendant, and that said McCosker and others were employed by the defendant to assist said Luke in said duties. That the immediate superior of said Luke in the service of the defendant was the train dispatcher, whose orders and instructions said Luke was at all times bound to obey, and who was under the control of the general superintendent of the defendant.

*"Fourth.* That on or immediately prior to the 25th day of May, 1877, a certain caboose car was brought into the yard from some point on defendant's railroad, having the bumper upon its easterly end so broken that it could not be coupled to another car by the ordinary method. That said Luke having on the day aforesaid received instructions from defendant's repair shop to send said car to said shop (which was situate in defendant's yard at Hunter's Point), for repairs to said bumper, instructed McCosker and another driller to assist him, the said Luke, therein; that said car was then standing at or near the westerly end of one of the tracks in said yard; within a few feet to the easterly and upon the same track stood four cars coupled together, but detached from the car with the broken bumper; these were flat cars about four feet high above the rail; and still farther to the easterly, upon the same track, stood a train of ten flat cars, each of the height aforesaid, and having an engine attached thereto at the easterly end, facing easterly. That said Luke instructed said McCosker and another



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driller to take a chain and attach the same to the said broken bumper, and also to the car standing next easterly thereof; in order that said broken car might be hauled to the repair shop. That while the said McCosker and the other driller were so engaged the said Luke, who was standing near the engine, signaled the engineer to back his train. That the said engineer thereupon, without signal or warning, backed the said engine and train in a westerly direction in such manner that the rear car of said train struck against the four detached cars, and forced the car next easterly of the car with the broken bumper backward upon and against said McCosker, so that he was crushed between said two cars last mentioned and sustained injuries, from which he subsequently died on the 5th day of June, 1877. That the said injuries were sustained at about half past eleven o'clock in the morning of the 25th day of May, 1877.

"*Fifth.* That said Luke knew of the broken bumper before he gave the order to deceased; that the said defect was patent and noticeable to any one familiar with railroad cars."

The defendant moved that the complaint be dismissed, on the following grounds:

"*First.* That the acts of the yardmaster Luke, so far as they tended to cause the injury, were those of a fellow-servant with the deceased, for which defendant is not liable.

"*Second.* That there is no evidence of any failure to perform the duties which defendant owed to said deceased, either on its part or on the part of any person to whom it had delegated the performance of such duties.

"*Third.* That plaintiff has failed to establish a cause of action against the defendant."

The court denied the motion, and the defendant duly excepted.

*Edward E. Sprague* for appellant. The test of the master's liability is the character of the act, in the performance of which the injury arises. (*Crispin v. Babbitt*, Ct. App., Sept. 21, 1880; *Rose v. B. & A.*, 58 N. Y. 217, 220; *Farwell v. B.*

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& *W. R. R.*, 4 Metc. 49; *Corcoran v. Holbrook*, 59 N. Y. 517; *Eagan v. Tucker*, 18 Hun, 347.) Defendant was bound to use due diligence in providing proper and sufficient tools, machinery and apparatus for the use of servants and in employing fellow-servants, competent and sufficient in number, and in discharging such as he knows, or ought to know, to be incompetent. (*Wright v. N. Y. C.*, 25 N. Y. 562, 565; *Flike v. B. & A.*, 53 id. 549, 553; *Keegan v. Western R. R.*, 8 id. 175; *Ryan v. Fowler*, 24 id. 410; *Plank v. N. Y. C.*, 60 id. 607; *Mehan v. S. B. & N. Y.*, id. 615; *Manning v. Hogan*, 78 id. 615; *Kirkpatrick v. N. Y. C.*, 79 id. 240; *Gage v. D. L. & W.*, 14 Hun, 446; *Cons v. D. L. & W.*, 15 id. 172; *Hawley v. North. Cent.*, 17 id. 115; *Connolly v. Poillon*, 41 Barb. 366; *Spelman v. Fisher Iron Co.*, 56 id. 151; *Laning v. N. Y. C.*, 49 N. Y. 521; *Brickner v. N. Y. C.*, 2 Lans. 586; *Sprong v. B. & A.*, 58 N. Y. 56; *Booth v. B. & A.*, 73 id. 38; *Harney v. N. Y. C.*, 19 Hun, 556; *Heiner v. Heuvelman*, 45 N. Y. Supr. 88.) Errors in starting trains are not imputable to the corporation as master. (*Rose v. B. & A.*, 58 N. Y. 217, 221; *Wright v. N. Y. C.*, 25 id. 562; *Haskin v. N. Y. C.*, 65 Barb. 129, 134; 56 N. Y. 608.) The yardmaster's act in signaling the engineer had no relation whatever to his authority to hire and discharge. (*Crispin v. Babbitt*, *supra*; *Barringer v. D. & H. C. Co.*, 19 Hun, 216.) The yardmaster and plaintiff's intestate were co-employees. (*Laning v. N. Y. C.*, 49 N. Y. 528; *Feltham v. England*, L. R., 2 Q. B. 33; *Wilson v. Merry*, L. R., 1 Scotch App. 326; *Barringer v. D. & H.*, 19 Hun, 216; *Searle v. Lindsay*, 11 O. B. [N. S.] 420; *McMahon v. Henning*, 11 Rep. No. 2, p. 42; *M. & M. R. R. v. Smith*, 6 Rep. 264.)

*Clifford A. H. Bartlett* for respondent. A person, to whom a corporation delegates executive duties, the appointment and dismissal of laborers and employers, stands in the place of the corporation and is not a co-servant. (Shearman & Redfield on Negligence, § 103; Wharton on Negligence, §§ 222, 223, 235; Thompson on Negligence, vol. 2, p. 1030;

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*Besel v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 171, 175, 176; *Flike v. Boston & Alb. R. R.*, 53 id. 553; *Laning v. N. Y. Cent.*, 49 id. 533; *Brickner v. N. Y. C. R. R.*, 2 Lans. 517; affirmed, 49 N. Y. 672; *Malone v. Hathaway*, 64 id. 9; *Bradley v. N. Y. C. R. R.*, 62 id. 99; *Booth v. B. & A. R. R.*, 74 id. 40; 22 Alb. L. J., No. 3, p. 54; id., No. 22, p. 483; *Eagan v. Tucker*, 18 Hun, 345-349; *Fort v. Whipple*, id. 591.) A corporation is liable to its servant for any injury happening to him in furnishing implements and facilities improper and unsafe for the purposes to which they are to be applied. (*Spelman v. Fisher Iron Co.*, 56 Barb. 155-165; *Le Clair v. The First Division of the St. P. & P. R. R.*, 20 Minn. 9; *Stoddard v. St. Louis, K. City & N. R. R.*, 65 Mo. 520; *Dobbin v. Richmond & Danville R. R. Co.*, 81 N. C. 547; *Deveny v. Vulcan Iron Works*, 4 Mo. 236; *Mullen v. Philadelphia & Southern Mail Steamship Co.*, 78 Penn. St. 26, 32; *Whalen v. The Centenary Church, etc.*, 62 Mo. 326; *Gormley v. Vulcan Iron Works*, 61 id. 492; *Railway Co. v. Leus*, 33 Ohio, 200; *Railroad Co. v. Keary* [1854], 3 Warren & Smith [Ohio], 209, 210; *Railway Co. Fort*, 17 Wall. 559; *Ford v. Fitchburg R. R.*, 110 Mass. 260; *Hough, etc. v. The Texas & Pac. R. R. Co.*, 10 Otto, 213.) Where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. (*Chicago & N. W. R. R. v. Bayfield*, 37 Mich. 213; *Berea Stove Co. v. Craft*, 31 Ohio, 292; *Brabbits v. Chicago & N. W. R. R.*, 38 Wis. 289.) The yardmaster, Luke, stood in the place of the company *pro hac vice*. (*Smith v. Chicago, Mil. & St. P. R. R.*, 42 Wis. 526; *Ford v. Fitchburg R. R.*, 110 Mass. 240.)

FINCH, J. The doctrine established by our decision in *Crispin v. Babbitt* (81 N. Y. 516) is fatal to the plaintiff's claim. The yardmaster, through whose negligence the injury occurred, must be deemed to have been a fellow-servant of the deceased, as to all acts done within the range of the common employment, except such as were done in the performance of some duty

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which the master owed to his servants. The act, in the present case, was very plainly not of that character. The yardmaster was charged with the duty of making up the trains and distributing the cars in and about the yard, and the repair-shops of the defendant, and the deceased was employed by him to assist in that service. As a necessary consequence, broken and disabled cars had to be handled and moved to the repair-shops, and whatever of risk was inseparable from their damaged condition, and the inconvenience, and even danger, of getting them to the shops was an open and palpable risk of his employment, which the deceased assumed. It is, of course, no ground of liability of the company that the bumpers of this car were broken, and it could not be coupled in the ordinary way. The deceased was employed to handle and move to the repair-shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front with the aid of a chain, and by direction of the yardmaster, the latter negligently, and at the wrong moment, signaled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair-shop. What the yardmaster was doing was the work of a servant, in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted. The question of liability was distinctly raised upon a motion for a nonsuit, based upon the grounds that the acts of the yardmaster, so far as they tended to cause the injury, were those of a fellow-servant with the deceased, and that there was no evidence of any failure to perform the duties which defendant owed to deceased, either on its part or on the part of any person to whom it had delegated the performance of such duties.

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The motion should have been granted, and its denial was error, for which the judgment should be reversed.

All concur, except DANFORTH, J., not voting, and RAPALLO, J., absent.

Judgment reversed and new trial granted, costs to abide the event.

ELIZA A. BOONE, Respondent, v. CITIZENS' SAVINGS BANK OF  
THE CITY OF NEW YORK, Appellant.

S. deposited with defendant, a savings bank, a certain sum of money, receiving a pass-book, which stated that the account was with her, "in trust for Christopher Boone," plaintiff's intestate. S. received the pass-book and drew out one year's interest. After her death defendant paid the amount to her administrator, upon production of his letters of administration and of the pass-book. In an action to recover the deposit, *held* that, in the absence of any notice from the beneficiary, the payment was good and effectual to discharge the defendant; that the deposit constituted S. trustee and transferred the title to the fund from her individually to her as such trustee; that, upon the death of S., her rights as trustee to demand and receive the fund devolved upon her administrator, and upon his demand defendant was bound to pay it over; it had no right to inquire into the nature of the trust, and owed no duty to the beneficiary until the latter by notice, by forbidding payment or by demanding it himself, created such right and duty.

*Boone v. Citizens Savings Bank* (21 Hun, 235) reversed.

*Martin v. Funk* (75 N. Y. 134) distinguished.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 11, 1880, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial, without a jury. (Reported below, 21 Hun, 235.)

This action was brought by plaintiff, as administratrix of Christopher Boone, to recover the amount of a deposit with defendant, a savings bank.

The facts found are substantially these:

On March 23, 1866, Susan Boone deposited with the defendant the sum of \$500, and received in acknowledgment therefor a pass-book containing the following entry:

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"Book No. 14,613.—The Citizens' Savings Bank in account with Susan Boone, in trust for Christopher Boone.

March 23d, 1866, \$500."

At the time of making such deposit Mrs. Boone declared that she wanted the account to be in trust for Christopher Boone, and in pursuance of her request it was so deposited and entered, and the aforementioned pass-book was issued. On March 29, 1867, Mrs. Boone made a draft on said account of \$22.71, being the interest that had accrued on the amount so deposited. To what use the money so drawn was applied does not appear. Aside from such draft, said account in the life-time of Mrs. Boone was neither diminished nor added to, except by the accumulation of interest allowed by the bank. The rules of the bank were printed in the pass-book delivered to Mrs. Boone at the time said deposit was made, and, among other things, said rules provided that all "deposits and all withdrawals shall be entered, at the time they are made, in the books of the bank, and also in a pass-book to be given the depositors at the time the first deposit is made. The pass-book shall be the voucher of the depositor, and evidence of his property in the institution, and the presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer thereof."

"The officers of the bank will endeavor to prevent fraud upon its depositors; but all payments to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank."

"On the decease of any depositor the amount standing to the credit of the deceased may be paid to his or her legal representatives when legally demanded."

After the death of Mrs. Boone, the pass-book passed into the possession of Edward Funk, her administrator, who presented the same to the defendant, with his letter of administration, and demanded payment of the amount due on said pass-book; the defendant thereupon paid to said administrator the whole amount then remaining unpaid on account of said deposit.

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*Albert Mathews* for appellant. There was no valid gift *in presenti*, passing the legal title to this money by Susan Boone to Christopher C. Boone. (Perry on Trusts, § 311; *Day v. Roth*, 18 N. Y. 453; *Geary v. Page*, 9 Bosw. 298; *Young v. Young*, N. Y. Ct. of App., April 6, 1880; 10 Wkly. Dig. No. 6, 137.) There was not, in fact, a complete and perfect declaration of trust, in respect to this money, by Susan Boone, in favor of Christopher C. Boone, valid and sufficient to divest her of all beneficial interest in the fund. (*Hartley v. Nicholson*, L. R., 19 Eq. Cas. 242; *Bagshaw v. Spencer*, 1 Ves. Sr. 152; Perry on Trusts, § 359; *Otis v. Beckwith*, 49 Ill. 121; 68 id. 25; 18 Am. Rep. 541; 4 Kent's Com. 305; *Field v. Lonsdale*, 13 Beav. 78; *Babcock v. Bos. Sav. Bk.*, 104 Mass. 228; *Stone v. Bishop*, 4 Cliff. [U. S. C. C.] 593; *Stone v. Brush*, U. S. Sup. Ct., Mich. 1880; *Weber v. Weber*, 58 How. Pr. 255.) The bank being merely the naked bailee of the depositor, in her character of trustee, was bound to surrender the fund to her and her successors in the trust upon demand, and the delivery to it of the "pass-book." (*Rogers v. Weir*, 34 N. Y. 471.) Administration having been granted upon the estate of Susan Boone, her administrator became at law immediately chargeable with all personal property held in trust by his intestate, not merely as administrator for the purposes of administration, but as successor in law to the deceased as a trustee; and it became his duty to take immediate possession of and to hold such property, subject to the same trust as his intestate, and predecessor in the trust, had held it. (*Dias v. Brunnell*, 24 Wend. 13; *Kane v. Gott*, id. 661; *Grout v. Van Schovenhoven*, 1 Sand. V. C. 99; *Bucklin v. Bucklin*, 1 Abb. Ct. of App. Dec. 242; *Bunn v. Vaughn*, id. 253; *Emerson v. Blakely*, 2 id. 22; *Wheatley v. Purrr*, 1 Keen, 151.)

*Edwin G. Davis* for respondent. The payment did not discharge the bank. (*Allen v. Williamsburg Sav. Bk.*, 69 N. Y. 314; General Sav. Bk. Act, Laws 1875, 408, § 24; *Appleby v. Erie Co. Sav. Bk.*, 62 N. Y. 12.) The trust created by the deposit was *ipso facto* executed and did not descend to the per-

sonal representatives of the trustee. (*Martin v. Funk*, 75 N. Y. 134; *Young, Adm'r, v. Young*, 9 Wkly. Dig. 73.)

FINCH, J. The case of *Martin v. Funk* (75 N. Y. 134) determined that the deposit made with the defendant by Susan Boone constituted her a trustee for Christopher Boone, and transferred the title to the fund from her as an individual to her as a trustee. It further determined that in an action by the beneficiary against the administrator of the trustee, and the depository, the *cestui que trust* was entitled to a delivery of the pass-book, which constituted the voucher for the deposit, and to receive the money from the bank. It did not, however, decide the question presented here, whether a payment by the bank to the administrator, upon the production of his letters, and of the pass-book, and in the absence of any notice from the beneficiary, was a good payment and effectual to discharge the bank.

It may not be doubted, that if the intestate, in her life-time, had demanded the money of the bank and presented her pass-book, no claim by the beneficiary having been interposed, the bank would have been bound to pay; and this for the reason that such was their express contract. They received the money as bailees, agreeing to pay it on demand to Susan Boone, trustee. What the trust was they neither knew, nor were bound to inquire. That was a matter wholly between trustee and *cestui que trust*, at least, until the latter gave notice to the bank of a hostile claim. They had received the money of the trustee, agreeing to return it to her, as trustee, on demand. When she called for it they were bound to pay, and having done so were discharged from all liability. And this was all the more certainly true because of the peculiar provisions of the contract. It was one of the stipulated terms of the deposit, expressly agreed upon at the time, that "the pass-book shall be the voucher of the depositor, and evidence of his property in the institution, and the presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer thereof; that the officers of the bank will endeavor to



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prevent fraud upon its depositors ; but all payments to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank." We held, in *Allen v. Williamsburgh Savings Bank* (69 N. Y. 317), that such a stipulation was lawful, and both parties were bound by its terms. If, therefore, Susan Boone, trustee, to whose credit the deposit stood, had appeared at the bank, and demanded the fund, producing the pass-book as her voucher, and the bank had paid her the money, it is certain that the payment would have been good, and no liability would remain on the part of the bank to any after claim of the *cestui que trust*. The payment would have been made to the right party — to the person lawfully entitled.

But Susan Boone died before withdrawing the money. If, now, her right to demand and receive the deposit devolved upon her administrator, no change came over the right and duty of the bank, as it respected a payment to him. All the right of the deceased to demand and receive the money would pass to him, and such payment by the bank to him would be as effectual a discharge as if paid to the intestate in her life-time.

We are of opinion that upon the death of Susan Boone, her rights as trustee devolved upon her administrator. (*Banks v. Evers of Wilkes*, 3 Sandf. 99; *Bucklin v. Bucklin*, 1 Abb. Ct. of App. 242; *Bunn v. Vaughan*, id. 253; *Emerson v. Bleakley*, 2 id. 22; *Trecothick v. Austin*, 4 Mason, 16, 29.) He took the property, which, although money, was a distinct and separate fund, and not mixed with the money of the estate, as trustee, not as assets, and held it with all the rights, and subject to all the duties of the deceased trustee whom he succeeded. When, therefore, he appeared at the bank and produced his letters of administration, and the pass-book, which, by the contract, was evidence of his right to withdraw the deposit and demanded its payment, the bank had no alternative. It had no right to inquire into the character of the trust, and owed no duty to the beneficiary, until the latter, by notice, or forbidding payment, or demanding it for himself, created, on the part of the bank, such right

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and duty. Until then the character of the trust did not concern the bank. Whatever it was in fact, was immaterial, and could not affect the right and duty of the bank to pay the person to whom it owed the debt.

It is true that payment to the person presenting the pass-book is not always and absolutely a discharge to the bank. If paid to one who is neither the depositor, nor in case of death, the legal representative of the depositor, the bank, if it has agreed to use its best endeavors to prevent fraud, must exercise diligence, and is put on inquiry by circumstances of suspicion. (*Allen v. Williamsburgh Sav. Bank, supra.*) But that rule only applied to prevent payment to the wrong person; to one not entitled to receive the deposit. If the right person applies, and payment is made to him, the question of diligence or negligence cannot arise, for nothing has occurred to call it into play.

Nor does it alter the situation to call this an executed trust, and insist upon the right of the beneficiary to have the pass-book, and the fund. If he has such right it reaches the bank through the trustee, and the bank can only pay the beneficiary at the peril of establishing the latter's right as against the trustee to the possession of the fund. It may take that risk, if it chooses, but it is not bound to take it. It may be compelled by the action of the *cestui que trust* to hold the fund as against the trustee, and pay the money into court to await an adjustment of their respective rights, but in the absence of any claim or interference of the beneficiary, it can recognize no one but the depositor or his representative, having possession of the pass-book as the agreed voucher, and evidence of title and payment to him is good. What else remains is wholly a question between trustee and *cestui que trust*.

The recovery, therefore, in this case cannot be sustained, and the judgment should be reversed with costs.

All concur, except RAPALLO, J., absent.

Judgment reversed.

ELIZABETH A. DENIKE et al., Respondents, v. CHARLES J. HARRIS et al., Executors, etc., Appellants.

The creator of a trust requiring the investment of money may designate how the investment may be made and what security may be taken, and he may dispense with all security.

D., defendant's testator, prior to his death was a special partner of the defendant R., having contributed \$15,000 to the capital of the copartnership. The will of D. directed his executors to allow R. "to retain as a loan to him" out of the testator's personal estate, the sum of \$15,000, which was specified as being the amount so invested in the business, "to be used and employed by him in carrying on and conducting the said business," for a term at the option of R., not exceeding three years, upon his paying annual interest at the rate of five per cent, with a further direction to said executors "at the expiration of said time or sooner determination thereof at his option aforesaid" to receive from R. the said sum with interest, and to discharge him fully from all further liability on account or by reason of such indebtedness;" and upon such payment the principal was directed to become part of the testator's residuary estate. The testator left a large estate, the defendants as his executors were authorized to sell and dispose of the realty, and to sell and convert into money the personalty. In the inventory of the testator's estate filed by the executors, his interest in the partnership was appraised at \$14,000. In an action brought by the residuary legatees to restrain the executors from making the loan to R. unless he gave security, *held*, that it was not the intent of the testator that R. should give security; and that the action was not maintainable.

*Denike v. Harris* (28 Hun, 213), reversed.

(Argued January 28, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 14, 1880, affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term. (Reported below, 23 Hun, 213.)

The nature of the action and the facts appear sufficiently in the opinion.

*S. P. Nash* for appellants. If Reeves took the \$15,000 as a loan, the testator's estate became relieved from liability as partner, and Reeves became debtor to the estate, paying interest.

## Statement of case.

(2 Lindl. on Partn. 806; *Barfield v. Loughborough*, L. R., 8 Ch. App. 1; *Vyse v. Foster*, L. R., 7 Eng. & Ir. App. Cas. 318; *Hutton v. Rossiter*, 7 De G., M. & G. 9.) There was not in fact, though the will so assumes, any personal indebtedness from Reeves to the testator. (*Barfield v. Loughborough*, L. R., 8 Ch. App. 3.) On the death of one partner, the survivor is entitled to wind up the business; the assets vest in him. (Collyer on Partn., § 129.) No partner can, by his will, deprive the survivor of this right of administration, and it is only in case of mismanagement or improper conduct on the part of the surviving partner that a court of equity interferes, by appointing a receiver, to wind up the concern. (*Evans v. Evans*, 9 Paige, 178.) The testator's interest can be got out of the assets only by a liquidation, and can be got out immediately only by a forced sale. (Collyer on Partn., § 129.) If this be done through a receiver, the assets will be sacrificed, and the executors will receive only such a proportion of the residue as will result from the liquidation and without interest. (*Barfield v. Loughborough*, L. R., 8 Ch. App. 1.)

*Homer A. Nelson* for respondents. If the will provided for a loan of the \$15,000 by the executors to Reeves, security should be required. (*King v. Talbot*, 40 N. Y. 76, 88; *Vernon v. Vernon*, 53 id. 363.) This being a pecuniary bequest for a certain period, with a limitation over, the executors are bound to protect the interest of those in remainder by requiring security from the first taker. (*Langston v. Ollivant*, Coop. 33; *Stuart v. Stuart*, 3 Beav. 430; *Pechel v. Fowler*, 2 Anst. 550; *Morilock v. Buller*, 10 Ves. 308-9; *Lord Mahon v. Earl Stanhope*, 2 Sug. on Pow. 512; *Cowgill v. Lord Ormington*, 3 Y. & C. 369; *Watts v. Gridleston*, 6 Beav. 188; *Moseley v. Marshall*, 22 N. Y. 200; *Briggs v. Earl, etc.*, 19 Jurist 817; *Freeman v. Cook*, 6 Ired. Eq. 376; *Woodman v. Good*, 6 W. & S. 169; *Whitfield v. Bennett*, 2 P. Wms. 242; *Marker v. Marker*, 9 Hare, 1; *Davis v. Lee*, 6 Ves. 786; *Swan v. Leigan*, 1 McCord's Ch. 227; *Boswell v. Morehed*, 1 Busb. Eq. 26; *Frazer's Adm'r v. Buill*, 11 Gratt. 9; *Foley*

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Opinion of the Court, per EARL, J.

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v. *Burnell*, 1 Bro. C. C. 279; *Woods v. Sullivan*, 1 Swan, 507; *Wootton v. Burch*, 2 Md. Ch. 190; *Smith v. Ostrander*, 64 N. Y. 278; *Tyson v. Blake*, 22 id. 563; Story's Eq. Jur., §§ 845-845a; *Vernon v. Vernon*, 53 N. Y. 351-363; *Dewitt v. Schoonmaker, Exr.*, 2 Johns. 245-6; *Lenpton v. Lenpton*, 2 Johns. 628; *Clark v. Clark*, 8 Paige's Ch. 160; Court in *Covenhoven v. Shuler*, 2 id. 122-132; 2 Story's Eq. Jur., § 845; *James v. Scott*, Ala. 578; *Emmons v. Cairns*, 2 Sandf. Ch. 369; *Van Duyne v. Vreeland*, 1 Bresl. [N. J.] 142; Willard's Eq. Jur. 328-330; *Prinscilla Kuinard v. Sharp & Jones, Exrs.*, 5 Watts [Penn.], 108; Abridgement Equity Cases, 360, part 4; 1 Chan. Cases, 199; *Jolly v. Mills*, 2 Chan. Cases, 137; 2 Chan. R. 151; *Ferrance v. Prentice*, Ambler, 273; *Walker v. Cook*, cited in 1 Bro. C. C. 105; *Green v. Pigott*, id.; *Henderson v. Vaulk*, 10 Yerger, 30; Willard's Eq. Jur. 330-1; *Tyson v. Blake*, 22 N. Y. 558; *Munch v. Cochereil*, Myl. & Cr. 178; *Kyle v. Barnett*, 17 Ala. 306; *Elmen-dorf v. Lansing*, 4 Johns. Ch. 565.)

EARL, J. For some time before his death the testator was a special partner of the defendant in the business of selling agricultural implements; and as such special partner he had contributed to the capital of the partnership the sum of \$15,000. On the 1st day of January, 1879, an account then taken of the assets and condition of the partnership showed his interest therein to be the sum of \$17,908. On the 17th day of July thereafter he made and published his will, in which he nominated his partner, Reeves, and the defendant Harris as his executors; and he died on the 6th day of September, 1879. The will was subsequently admitted to probate, and the executors qualified and entered upon their duties as such. The testator's personal property amounted to over \$142,000. In his will he gave various legacies, to be paid within three years after his death, and he bequeathed to his executors the sum of \$11,500 in trust, to apply the income of a portion thereof during a minority and of another portion thereof during a life designated, and at the expiration of the trust he gave the

principal sum to persons designated. He empowered his executors to sell all or any of his real estate, and to sell and convert into money, at public or private sale, his personal estate, for the purpose of paying debts and legacies and making distribution among the residuary legatees. He also directed and empowered his executors to sell and dispose of any and all vessels owned by him at his decease, whenever they deemed it for the best interests of his estate, and provided that they should in no manner be held accountable for the loss or depreciation in value of such vessels. The tenth clause of the will, which gave rise to the present controversy, is as follows: "It is my will, and I do hereby order and direct my executors, hereinafter named, to allow my friend, Robert C. Reeves, to retain, as a loan to him out of my personal estate, the sum of \$15,000, being the amount now invested by me in the business carried on and conducted by him, and in which I am a special partner, to be used and employed by him in carrying on and conducting the said business, and to be continued from year to year at the option of the said Robert C. Reeves, but not to exceed the term of three years, upon his paying the interest thereon annually at the rate of five per cent per annum. Such income, when received by my said executors, to be from time to time paid over to my residuary legatees, and at the expiration of said term, or the sooner determination thereof at his option aforesaid, I direct my said executors to receive from the said Robert C. Reeves the said sum of money and interest, and to discharge him fully from all further liability on account or by reason of such indebtedness, and upon such payment being made to my said executors, the said sum of \$15,000 is to become a part of my residuary estate, and to be distributed according to the provisions of this my will with respect thereto."

In the inventory of the testator's estate, filed by the executors after his decease, his interest in the partnership with Reeves was estimated and appraised at \$14,000.

The plaintiffs, two of the three residuary legatees named in the will, for themselves and the other residuary legatee, com-

menced this action to restrain the executors from making the loan to Reeves mentioned in the tenth clause of the will, without requiring of him security therefor. They alleged in their complaint, among other things, that the executors proposed and intended to make the loan without taking security; that the business in which Reeves was engaged was one peculiarly of great risk, and that he had but little or no property. The defendants in their answer, among other things, denied that the business of Reeves was one peculiarly of great risk, as alleged in the complaint, and they denied that he had little or no property, and alleged that he was and had at all times been solvent and able to pay all his debts.

The court, at Special Term, found, upon the allegations in the complaint and answer above specified, without any proof, that the business in which Reeves was engaged was one of risk—not that it was peculiarly risky, or more risky than other kinds of commercial or mercantile business. He also found that Reeves intended to use the money, if loaned to him, in his business, and that it would thus be at risk, peril and jeopardy, and liable to be lost; that the executors intended to loan him the money, and refused to take any security therefor, although they had been requested to do so by the plaintiffs. And the court ordered judgment for plaintiffs, among other things, that the executors should not loan the \$15,000 to Reeves, or permit him to retain that sum, as provided in the tenth clause of the will, without requiring and obtaining from him sufficient and proper security for the safe payment and return of the sum thus loaned or retained at the end of the three years. The judgment thus ordered was, upon appeal by the defendants, affirmed at the General Term, and then they appealed to this court.

The claim of the plaintiffs, which has thus far been sustained by the Supreme Court, is, that in making this loan, the defendants are in the position of all trustees authorized to loan trust funds, and that they are bound by the general rules of law to take proper security. That rule is supposed to require trustees exercising a general authority to make investments to

take government or real estate securities. (*King v. Talbot*, 40 N. Y. 76.) But the creator of a trust requiring the investment of money may designate how the investment may be made, and what security may be taken, and he may dispense with all security. The question here is, did the testator intend that Reeves should give security for the sum to be retained by or loaned to him? We think it clear that he did not. He appointed him one of his executors without requiring him to give security, investing him as such with large discretion over a large estate, to be exercised during a long period of time. He evinced entire confidence in his sound judgment, capacity, integrity and solvency. He called him "his friend," knew him well, had for a considerable time been associated with him in business, and was well acquainted with the business in which he was engaged and the risks incident thereto. He had invested in that business \$15,000, and intrusted it to the management of Reeves without, so far as appears, any security. He evidently did not want the business broken up and Reeves and his own estate subjected to the loss which might be caused by closing it up in the ordinary way required by law. He meant also to favor Reeves by giving him the use, during the time mentioned, of the money which he had invested in the business, so that he could continue the business if he desired to. If Reeves were required to give the security exacted, the loan would be no favor to him. He might not be able to give such security; and if he could, he could borrow the money without difficulty of other lenders. The language used precludes the idea of security. As executor he was required to give no security. The property was then in his hands, and as surviving partner he was required to give no security. He was to be allowed "to retain" the sum named. If the testator had intended that security should be exacted for the loan, that matter would have been in his mind and probably expressed. Here then the testator designated the person to whom the loan should be made and the rate of interest, and under such circumstances and in such language, that we think it was intended that the loan should be without security.



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Statement of case.

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It matters not that the sum thus loaned is put in some jeopardy — subjected to such risks as ordinarily attend the carrying on of any business or the loaning of money upon merely personal security. The testator contemplated such risks, and was willing his executors should take them. It does not appear that the financial condition of Reeves had changed any since the making of the will. So far as appears, he had the precise responsibility which the testator contemplated when he made his will. The fact that the partnership interest was inventoried after the testator's death at a less sum than it was supposed to be worth on the prior first day of January is not a very significant fact. It does not appear that the appraisals at the two dates were made by the same men or upon the same basis. The fact that the interest was inventoried at \$14,000 is not conclusive that it might not be made to produce more, if settled as contemplated by the testator.

Our decision is based upon the facts as they now appear. The sum to be loaned was for use by Reeves "in carrying on and conducting" his business. He could not claim the loan for any other purpose. If he was actually insolvent, or if for any other reason he was not in a condition to go on with his business, he could not claim the loan.

We are, therefore, of opinion that no case was made justifying the decision rendered herein, and the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

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PETER E. LE FEVRE, as Executor, etc., Respondent, v. ELIZA P. TOOLE, Appellant, et. al., Respondents.

The will of T., after directing the payment of his debts and funeral expenses and after giving a series of legacies, gave the residue of his estate, real and personal, to his wife. Then followed this clause: "and I authorize my executors after paying my just debts and funeral expen-

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Statement of case.

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ses to pay over to my wife \$5,000 in cash out of the bequeath to her and before any of the other bequeaths are paid off." The executors were authorized and directed to sell and dispose of all of the real and personal estate, with power to reserve certain parcels of real estate until prices specified could be obtained therefor. In an action to obtain a construction of the will, *held*, that the intent of the testator was to charge the payment of the legacies upon the real estate; also that the gift to the wife was in lieu of dower.

(Argued January 21, 1881; decided February 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made December 10, 1880, affirming a judgment entered upon the decision of the court on trial at Special Term.

This action was brought by plaintiffs, as executors of the will of William S. Toole, to obtain a construction of said will. The body of the will is as follows:

"After the payment of all my just debts and funeral expenses, I give and bequeath to my sister Jane the annual interest on the sum of \$12,000 during her life-time, my executors or executor to invest that amount, and the interest therein applied for her support during life.

"I give and bequeath to my brother-in-law, Benjamin D. Le Fevre, the sum of \$7,000.

"I give and bequeath to my niece, Susannah Conway, the sum of \$2,500.

"I give and bequeath to my niece, Elizabeth McCarty, of Syracuse, State of New York, the sum of \$3,000, and I give and bequeath to my nieces, Mary and Caroline Sherman, the sum of \$1,000 each.

"And I give and bequeath to my niece, Emma Daly, the sum of \$2,000; and I give and bequeath to Maggie, adopted daughter of Benjamin De Le Fevre, the sum of \$1,000.

"And I give and bequeath to Alice, daughter of Captain Peter E. Le Fevre, the sum of \$1,000; and I give and bequeath to Louisa, daughter of the late Joseph Fowler, of Port Chester, and now wife of David Williams, of Brooklyn, the sum of \$1,000.

## Statement of case.

"And I give and bequeath to the corporation of Trinity church, New Rochelle, the sum of \$2,000, to be appropriated alone toward paying off the debt of said church. And I give and bequeath to A. La Fabrique, now in my employ, the sum of \$500.

"And I give and bequeath to Edward Barrett, now in my employ, the sum of \$250. And I give and bequeath to my wife Eliza Priscilla all the rest and residue of my real and personal estate; and including the amount which is reserved for my sister Jane's support during life, and which amount, after the death of said sister, is for my wife or her heirs.

"And I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife the sum of \$5,000 in cash out of the bequeath to her, and before any of the other bequeaths are paid off.

"And I do hereby appoint my brother-in-law, Benjamin D. Le Fevre, and Captain Peter E. Le Fevre, both of New Rochelle, Westchester county, to be the executors of this my last will and testament, and in case either of them should decline, then I appoint Dr. John Conway, of the city of New York, in their place to carry this will into execution, and do hereby request and empower them, or whichever of them shall assume the execution of this my last will, to proceed and dispose of all my real and personal estate, which is situate in New Rochelle and Mamaroneck, Westchester county and State of New York, and in Newark, State of New Jersey, and in Barry and Clinton counties, State of Michigan; and I authorize my executors to reserve the property on which I reside until such time as it can be sold for not less than \$30,000 in cash, or its equivalent. And also the property in Huguenot Park and town of Mamaroneck, at from \$12,000 to \$15,000 each. And request my executors, or whichever shall assume the execution of this my will, to proceed with due diligence in realizing my personal estate, as well as the real estate, with the exceptions named. And give them power to sell and convey my real estate and give good and sufficient deeds therefor."

## Statement of case.

The court found the value of the testator's personal estate at his death to be \$20,000, and that he did not at the date of the will possess sufficient personal estate to pay his debts and the legacies.

*S. F. Cowdrey* for appellant. Lands devised by a will are not charged with the payment of legacies, unless there is either an express intent to charge them, or unless the intent to charge them can be fairly and satisfactorily inferred. (2 Jarman on Wills, 564, 575; 2 Redfield on Wills, 207, 208; Willard's Eq. Jur. 489; *Lupton v. Lupton*, 2 Johns. Ch. 614; *McKay v. Green*, 3 id. 56; *Harris v. Fly*, 7 Paige, 425; *Myers v. Eddy*, 47 Barb. 262; *Hoes v. Van Hosen*, 1 N. Y. 120; *Kelsey v. Watson*, 2 id. 500; *Kinnier v. Rogers*, 42 id. 534; *Bevan v. Cooper*, 72 id. 322.) The controlling circumstance, as indicating what the testator intended, is the fact that at the time of making his will he was possessed of personal property more than sufficient to pay all his legacies. (*Dubois v. Ray*, 35 N. Y. 167, 171, 175; Jarman on Wills, 365; *Myers v. Eddy*, 47 Barb. 266-275.) Technical rules must yield to manifest intention in construing a will. (Willard's Eq. Jur. 491; *Gardner v. Gardner*, 6 Paige, 455; *Dekay v. Irving*, 5 Den. 646; *Lytle v. Beveridge*, 58 id. 592; 4 Kent's Comm. 535 and note b, citing Ram. on Exp. of Wills; Williams on Ex'rs, 971.) The devise of the residuary estate by the testator to his wife does not, either technically or otherwise, create a charge of the legacies on the real estate. (2 Jarman on Wills, 564, 575; 2 Redfield on Wills, 207, 208; Willard's Eq. Jur. 489; *Lupton v. Lupton*, 2 Johns. Ch. 614; *McKay v. Green*, 3 id. 56; *Harris v. Fly*, 7 Paige, 425; *Myers v. Eddy*, 47 Barb. 252; *Hoes v. Van Hosen*, 1 N. Y. 120; *Kelsey v. Watson*, 2 id. 500; *Kinnier v. Rogers*, 42 id. 534; *Bevan v. Cooper*, 72 id. 322; *S. C.*, 7 Hun, 121; *Wright v. Dean*, 10 Wheat. 81; *Goddard v. Pomeroy*, 36 Barb. 546; *Schulters v. Johnson*, 38 id. 80; *Babcock v. Stoddard*, 3 S. C. 207; *Spillman v. Duryea*, 51 How. Pr. 260; *Weld v. Strong*, 54 id. 133; *Reynolds v. Reynolds*, 16 N. Y. 257.) The power

## Statement of case.

of sale does not supply the defect. The power is invalid. (*McCarty v. Terry*, 7 Lans. 238; *Moncrief v. Ross*, 50 N. Y. 431; *Gourly v. Campbell*, 60 id. 173; *Fisher v. Banta*, id. 476; *Vernon v. Vernon*, 53 id. 358; *Hamilton v. N. Y. St. Ex. Build. Co.*, 20 Hun, 89; *Crittenden v. Fairchild*, 41 N. Y. 291; *Kinnier v. Rogers*, 42 id. 533.) There has been no equitable conversion of the real estate. (1 Jarman on Wills, 560; *Wright v. Trustees Meth. Epis. Ch.*, Hoffman's Ch. 202, 219; *White v. Howard*, 46 N. Y. 144, 162; *McCarty v. Deming*, 4 Lans. 440; *Vernon v. Vernon*, 53 N. Y. 351; *Fowler v. Depau*, 26 Barb. 224; *Martin v. Sherman*, 2 Sandf. Ch. 343; *Forsyth v. Rathbone*, 34 Barb. 405; *Johnson v. Bennett*, 39 id. 237; *Irish v. Husted*, id. 411; *Harris v. Clark*, 7 N. Y. 242; *Dodge v. Pond*, 23 id. 69; *Horton v. McCoy*, 47 id. 25; *Power v. Cassidy*, 79 id. 613; *Dominick v. Michael*, 4 Sandf. 374; *Wright v. Methodist Epis. Ch.*, *supra*, 48; *Stagg v. Jackson*, 1 N. Y. 212; Story's Eq. Jur., § 793; *Milton v. Brigg*, L. R., 1 Ch. Div. 385; *Vernon v. Vernon*, *supra*; *Kane v. Gott*, 24 Wend. 641; *S. C.*, 7 Paige, 521; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Martin v. Sherman*, *supra*; *Dodge v. Pond*, *supra*; *McCarty v. Depau*, *supra*; *Power v. Cassidy*, *supra*; *Bogert v. Hertell*, 4 Hill, 500; *Murray v. Murray*, 2 Ch. Dec. 23; *Hawley v. James*, 5 Paige, 444; *Wood v. Cone*, 7 id. 471; *Prentice v. Janssen*, 79 N. Y. 478; Story's Eq. Jur., § 793; Leigh & Dalgett on Eq. Con. 177 [5 Law Lib. 89]; *Hetzel v. Barber*, 69 N. Y. 1; 1 Jarman on Wills, 564.) The widow of the testator has not lost her right of dower. (1 R. S. 691; *Lewis v. Smith*, 3 N. Y. 502; *Larabee v. Van Alstyne*, 1 Johns. 307; *Loucks v. Churchill*, 7 Cow. 287; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Smith v. Kniskern*, 4 id. 9; *Vernon v. Vernon*, 7 Lans. 492; *S. C.*, 53 N. Y. 351; *Fuller v. Yates*, 8 Paige, 325; *Sandford v. Jackson*, 10 id. 266; *Havens v. Havens*, 1 Sandf. Ch. 324; *Lasher v. Lasher*, 13 Barb. 106; *Mills v. Mills*, 28 id. 454; *Savage v. Burnham*, 17 N. Y. 561; *Tobias v. Ketchum*, 52 id. 319; *Sullivan v. Mara*, 43 Barb. 523; *Leonard v. Steele*, 4 id. 20; *Sandford v.*

## Statement of case.

*Sandford*, 58 N. Y. 69; *Bond v. McNiff*, 9 J. & S. 543; 1 Jarman on Wills, 480, 433.)

*Clarkson N. Potter* for respondents. The legacies are a charge upon the realty. (*Kalbfeisch v. Kalbfeisch*, 67 N. Y. 363; *Taylor v. Dodd*, 58 id. 343, 348; *Hoyt v. Hoyt*, 17 Hun, 192; *Greville v. Brown*, 7 H. of L. Cas. 689; *Lupton v. Lupton*, 2 Johns. Ch. 623; *Shusters v. Johnson*, 38 Barb. 80; *Reynolds v. Reynolds*, 16 N. Y. 257; *R. C. Church v. Wachter*, 42 Barb. 43; *Tracy v. Tracy*, 15 id. 505; *Dubois v. Ray*, 35 N. Y. 162, 175; *Van Winkle v. Van Houten*, 2 Green's Ch. 186; 2 Jarman on Wills, 742, note 10; *Horton v. McCoy*, 47 N. Y. 21; *Stoddard v. Johnson*, 20 Hun, 610; *Aubrey v. Middleton*, 2 Eq. Abr. 497; *Hassel v. Hassel*, 2 Dick, 527; *Bench v. Biles*, 4 Madd. 187; *Cole v. Turner*, 4 Russ. 376; *Kidney v. Cousemaker*, 1 Ves. Jr. 436; *Mirehouse v. Scarf*, 2 My. & Cr. 695; *In re Belles' Trusts*, 5 Ch. Div. 503 [22 Eng. R., Moak's Notes, 254]; *Lewis v. Darling*, 16 How. [U. S.] 1; *Hassaulener v. Tucker*, 2 Binn. 525; *Whitman v. Norton*, 6 id. 395; *McLanahan v. Wyant*, 1 Penn. 96; *Davis' Appeal*, 83 Penn. St. 348; *Gallagher's Appeal*, 12 Wright [Penn. St.], 121; *Van Winkle v. Van Houten*, 2 Green's Ch. 172; *Dey v. Dey*, 10 N. J. Eq. 140; *Carwine v. Carwines*, 24 id. 579; *Lapham v. Clapp*, 10 R. I. 543; *Adams v. Brackett*, 5 Metc. 262; *Knotts v. Baily*, 54 Miss. 235; *Hart v. Williams*, 77 N. C. 426; *McLaughlin v. McLaughlin*, 80 Barb. 459; *R. C. Church v. Wachter*, 42 id. 45; *Goddard v. Pomeroy*, 36 id. 547; *Weld v. Strong*, 54 How. 133; *Stoddard v. Johnson*, 13 Hun, 606; *Rafferty v. Clark*, 1 Bradf. 473; *Shulters v. Johnson*, 38 Barb. 80; *Ragan v. Allen*, 7 Hun, 537; *Hoyt v. Hoyt*, 17 id. 192; *Manson v. Manson*, N. Y. "Daily Register," Feb. 21, 1880; *Hall v. Thompson*, id., Dec. 30, 1880; *Kalbfeisch v. Kalbfeisch*, 67 N. Y. 363; *Taylor v. Dodd*, 58 id. 343; *Hoyt v. Hoyt*, 17 Hun, 192; *Taylor et al. v. Dodd*, 58 N. Y. 348; Story's Eq. Jur., § 1075; Willard's Eq. Jur. 544-548.) The widow must elect either to take her dower or the provision under the will. (4 Kent's Com. 58; *Lewis v. Smith*,

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9 N. Y. 511-512; *Herbert v. Wren*, 7 Branch, 370; *Savage v. Burnham*, 17 N. Y. 367; *Tobias v. Ketchum*, 32 id. 319; *Vernon v. Vernon*, 53 id. 351; 2 Story's Eq. Jur., § 1075; Willard's Eq. Jur. 544-558; *Dodge v. Dodge*, 31 Barb. 413; *Brink v. Layton*, 2 Redf. 79.) By the terms of the will there was an equitable conversion of the real estate into personalty, and this commingling of the two estates into one common fund made the legacies payable out of the whole estate, indiscriminately. (*Stagg v. Jackson*, 1 N. Y. 206; *Phelps v. Pond*, 23 id. 69; *Chamberlain v. Chamberlain*, 43 id. 424; *Monorief v. Ross*, 50 id. 431; *Taylor v. Dodd*, 58 id. 335; *Kalbfleisch v. Kalbfleisch*, 67 id. 354; *Graham v. Livingston*, 7 Hun, 11; *Brink v. Layton*, 2 Redf. 79; *Kearney v. Miss. Soc. of St. Paul* "Daily Register," March 3, 1880; *Allen v. Gott*, 2 Eng.; *Hall v. Thompson*, *supra*.)

FOLGER, Ch. J. We think that the testator intended to charge the payment of the legacies upon his real estate. All things in the will combine to show that intention.

After giving direction to pay his debts and funeral expenses, he gives a series of legacies, which are not unnatural in the objects of them. He then authorizes his executors, after paying debts and funeral expenses, to pay a sum certain to his wife in cash, but to pay it out of the "bequeath" to her. By that word he means that which he has given to her in another part of the will. That which he has thus given to her is the rest and residue of his real and personal estate.

If the \$5,000 is to be paid to her out of that gift, does it not seem a giving twice of the same gift, and an unmeaning thing? It would clearly seem so, but for the clause that goes with it, that this sum of \$5,000, is to be paid before any other of the bequests are paid off.

This deferring of the other bequests until the payment of the \$5,000 has no significance unless the other bequests are to be paid from the same fund as the \$5,000 to the wife. What is that fund? It is the rest and residue of the real and personal estate. That rest and residue is all that the testator gave his

wife; it is only from that rest and residue that the \$5,000 is to be paid. As it is to be paid therefrom before the other bequests are paid off, it cannot have been meant otherwise, but that they were to be paid therefrom also, though not until after the \$5,000 were paid to the wife. The power to proceed and dispose of all the real and personal, the request to proceed with due diligence in realizing the personal as well as the real estate, and the power to sell and convey his real estate, indicate the intention of the testator that the executors should come into the possession of a fund for some purpose. It could not have been for the purpose of paying the avails of the real estate over to the widow only, for if the real estate is not charged with the payment of legacies, and is left to her unincumbered thereby, she could sell and take the avails as well as the executors could sell and pay them to her. It could not have been to raise money to pay debts, etc., for there was clearly enough personal estate for that. There is but one other purpose to be found in the circumstances of the testator and that is to raise a fund for the support of his sister, to pay the widow the \$5,000 for her, and to pay off the other legacies.

We have so lately discussed this general subject in varying states of facts, and differing provisions of wills, that we need not restate principles here. (See *Taylor v. Dodd*, 58 N. Y. 335; *Kalbfleisch v. Kalbfleisch*, 67 id. 354; *Bevan v. Cooper*, 72 id. 638.)

There is no prohibition as is claimed upon the sale of portions of the real estate. There is a permission to reserve until a certain price is offered. The direction to sell is somewhat peremptory. The testator thought it needful to abate its tone. He therefore gave authority, not command or direction, to reserve portions for the offer of a price named.

The widow has not lost her right of dower in the lands, nor has it been taken away. The testator has given her what he thought would be better than, or as well as, dower. If she is not of that mind, she can reject his gift and take the dower that the law gives. The testator's evident intent was that his



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gift should be in lieu of dower, if the gift was taken by his widow.

We think that the legal questions arising in the suit were well disposed of in the courts below.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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KEZIA HARRINGTON, as Committee, etc., Respondent, v. NANCY BRUCE individually, and as Executrix, etc., Appellant.

This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them in fraud of the rights of the lunatic. *Held* that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character; and that an order of reference was not reviewable here.

(Argued February 1, 1881; decided February 8, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made April 6, 1880, affirming two orders of Special Term, one ordering a reference of this action to a referee to be agreed upon by the parties, the other referring it to a referee named; defendant having refused to select, or to agree to a referee under the first order.

The nature of the action appears in the opinion.

*Albert Moot* for appellant. A compulsory order of reference could not be granted in this action, because defendant is entitled to a trial by the court. (*Johnson v. Parmley*, 17 Johns. 129; *Greer v. Patcher*, 13 Wend. 203; *Dedericks v. Richley*, 19 id. 108; *Graham v. Golding*, 7 How. Pr. 260;

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Code of Civil Procedure, §§ 1011-1013; *Keeler v. P. & S. P. R. Co.*, 10 How. Pr. 11; *Townsend v. Hendricks*, 40 id. 143; *Kain v. De Lano*, 11 Abb. Pr. [N. S.] 29; *Welsh v. Darragh*, 52 N. Y. 590; *Place v. Chesebrough*, 63 id. 315; *Magown v. Sinclair*, 5 Daly, 63; *Keef v. Keef*, 9 Weekly Digest, 433.)

*Abram Thorn* for respondent. This action is a proper one for a reference. (*Goodyear v. Brooks*, 4 Robt. 682; 2 Abb. Pr. [N. S.] 296; *Batchelder v. Albany Ins. Co.*, 6 id. 240; 8 Abb. Digest, 544, §§ 4, 5; *Holmes v. Bennett*, 28 How. Pr. 289; 15 Abb. Pr. 308.)

ANDREWS, J. This was a referable action. Its primary purpose was to obtain an accounting of the rents and profits of real estate, owned in common by Silas and Seth Harrington, received by the latter, and of personal property belonging to them jointly, alleged to have been fraudulently appropriated by Seth Harrington, the defendant Nancy Bruce, and her former husband Alexander Bruce, in pursuance of a conspiracy between them, in fraud of the rights of Silas Harrington. The defendant is the executrix and the legatee and devisee of Seth Harrington; and the complaint alleges that she has now in her hands \$15,000 of the personal estate of John J. Harrington, deceased, which belonged equally to Silas and Seth Harrington, one-half of which now belongs to Silas, and demands, among other things, an accounting of the rents and profits of the real estate received by Seth Harrington, and of the personal estate left by John J. Harrington which came to his hands. The allegation of a fraudulent conspiracy to deprive the plaintiff of his rights in the property of his father does not change the character of the action. The pleadings show a case authorizing the court to refer the action, and its order is not reviewable here. (*Martin v. The Windsor Hotel Co.*, 70 N. Y. 101.)

The appeal should be dismissed.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

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Statement of case.

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FRANCIS McKERNAN, Respondent, v. BENJAMIN W. ROBINSON et al., JOHN FRASER, Appellant.

An action upon a guaranty of a mortgage is within the provision of the Revised Statutes (2 R. S., 191, §§ 153, 154), prohibiting any proceedings, unless authorized by the court, after bill filed to foreclose a mortgage for the recovery of the debt secured by the mortgage; and in the absence of such authority the action is not maintainable.

Where, however, such an action has been commenced without previous authority, the court may by subsequent order made *nunc pro tunc* grant permission, and so remove the impediment to the maintenance of the action founded upon the statute.

(Submitted February 1, 1881; decided February 8, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made December 14, 1880, affirming an order of Special Term denying a motion to vacate an order, the substance of which is hereinafter stated.

This was an action to foreclose a mortgage assigned to the plaintiff by one Fraser. The assignment contained a guaranty of the punctual payment of the mortgage, principal and interest.

Fraser, by the permission of the plaintiff, managed the foreclosure action. He told the attorneys that the plaintiff was willing to wait for her money until he, Fraser, could foreclose and sell the property, and by his direction he was not made a party. At the sale the property did not bring enough to pay the mortgage debt.

The plaintiff then sued Fraser in the Marine Court of the city of New York, upon the guaranty, without having obtained leave of the Supreme Court, according to the provision of the Revised Statutes. After the action was at issue the plaintiff obtained, *ex parte*, an order granting leave to sue *nunc pro tunc*. Fraser applied to set this order aside as irregular and improper. His application was denied.

*James C. Hays* for appellant. Plaintiff, after having commenced the action to foreclose the mortgage and after judg-

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ment therein, cannot bring another suit for the recovery of the debt, or take any proceeding whatever at law for such purpose without being authorized by the court in which the foreclosure suit was brought. (2 R. S. 191, §§ 152, 153, 154 [2d ed.]; *Scofield v. Doscher*, *Err.*, 72 N. Y. 491; *Eq. Life Ins. Soc. v. Stevens*, 63 id. 341; *Comstock v. Drohan*, 71 id. 9.) The authority to bring an action or take any proceeding at law was a condition precedent. (*Rae v. Beach*, 76 N. Y. 167.)

*James Hamilton* for respondent. The order is not appealable because it relates simply to a question of practice, and does not affect any substantial right of the appellant. (*McCoun v. N. Y. C. & H. R. R. Co.*, 50 N. Y. 176; *Arthur v. Griswold*, 60 id. 143; *People ex rel. Att'y-Gen. v. Sec'y S. Ins. Co.*, 79 id. 272; Code of Civil Procedure, § 190.) Even if the order affected a substantial right, it cannot be reviewed in this court, as it was a matter resting in the discretion of the court below to grant or refuse it. (*Howell v. Mills*, 53 N. Y. 323; *Eq. Life Ins. Co. v. Stevens*, 63 id. 341.) The court had power to grant the order *nunc pro tunc*. (*Earle v. David*, 20 Hun, 529; *Suydam v. Bartle*, 9 Paige, 294; Code of Civil Procedure, §§ 722, 723; 2 R. S. 191, § 153.) The statute applies to the holder of the mortgage only. (*Comstock v. Drohan*, 71 N. Y. 9; 8 Hun, 376.)

ANDREWS, J. The action in the Marine Court, upon the defendant's guaranty of payment of the mortgage, was brought after judgment of foreclosure and sale had been rendered in an action to foreclose the mortgage, and without the plaintiff having previously obtained the authority of the court. The case was within the provision of the Revised Statutes, that after bill filed to foreclose a mortgage, no proceeding whatever shall be had at law for the recovery of the debt secured by the mortgage, unless authorized by the court. The action, in the absence of such authority, could not be maintained. (2 R. S. 191, §§ 153, 154; *Scofield v. Doscher*, 72 N. Y. 491.)

But we are of opinion that the court, by an order made *nunc*

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*pro tunc*, made after the action was commenced, could remove the impediment to maintaining the action founded upon the statute. The statute was passed to prevent vexatious and oppressive litigation — and application for leave to sue at law, after proceedings in foreclosure have been commenced, may be refused, in the just and reasonable discretion of the court. Where leave to sue in such a case is given, the cause of action is the contract or obligation of the party. The permission of the court simply removes an obstruction against the enforcement by suit. If the action has been commenced without previous authority, the fact may be pleaded, and the plea would be in the nature of a plea in abatement to the action. If the plaintiff is defeated upon this ground, he may afterward apply to the court for leave to sue, and if granted, he may commence a new action for the same cause. If the plaintiff has commenced his action without leave, there would seem to be no valid reason why the court, instead of putting the plaintiff to the necessity of discontinuing, may not, in a proper case, manifest its consent to the prosecution of the action, by a retroactive order, to take effect as of a time anterior to its commencement. The defendant is thereby deprived of no substantial defense. The court, in granting the order, may impose such terms as shall be just.

The order made in this case was clearly in furtherance of justice. The defendant was the plaintiff's agent in conducting the foreclosure. He directed the attorneys employed by him not to make him a party, and he was not made a party for that reason. The cause of action on the guaranty was not barred by the judgment in the foreclosure action, and the order allowing the action to proceed was properly granted.

The order should be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.

THE ROOSEVELT HOSPITAL, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

Where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation, *held*, that such real estate was not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act.

*In re Van Antwerp* (56 N. Y. 261), *Harvard College v. Aldermen* (104 Mass. 470), distinguished.

In an action to vacate such an assessment, imposed in 1873, it appeared that the land had been assessed for the purposes of taxation in 1866, at which time it belonged to plaintiff. *Held*, that this was a sufficient basis for an assessment within the provision of the act of 1840 (§ 7, chap. 826, Laws of 1840), prohibiting an assessment for a local improvement exceeding half the value of the property as valued by the general tax assessing officers.

The assessment was for the construction of a sewer. It appeared that a general plan of sewerage for the district had been adopted and a map had been filed as prescribed by the act of 1865 (§ 2, chap. 881, Laws of 1865), upon which map the sewer in question did not appear. *Held* (RAPALLO and EARL, JJ., dissenting), that this alone did not vitiate the assessment; that when the needs of a district or any part of it, after a plan had been so adopted, required another sewer, the construction of it was authorized by the provision of said act (§ 4) permitting "such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue, or part thereof, in said district, or otherwise;" that to invalidate the assessment it must be shown, either that the sewer does not accord in its characteristics with the general plan, or that there has been no general plan devised, mapped and filed.

(Argued November 17, 1890; decided February 11, 1891.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 7, 1879, affirming a judgment entered upon a decision of the court on trial at Special Term. (Mem. of decision below, 18 Hun, 582.)

The nature of the action and the facts are set forth sufficiently in the opinion of EARL, J.

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*Lewis L. Delafield* for appellant. The property of the Roosevelt Hospital is exempt from the payment of this assessment by the special act creating it. (Laws of 1864, p. 3, § 3, fol. 47; *Harvard College v. Aldermen*, 104 Mass. 470; *Matter of Van Antwerp*, 56 N. Y. 261.) In its usual and common acceptation, both in the law and in common parlance, the word "tax" includes an assessment. (Bouvier, tit. "Taxes"; Webster, tit. "Tax"; Worcester, tit. "Tax"; 1 R. S. 908-909; *Matter of Van Antwerp*, 56 N. Y. 261, 265; *Stryker v. Kelly*, 7 Hill, 23, 24; *People v. Mayor*, 4 Comst. 425; *McComb v. Bell*, 2 Minn. 295; *Schenly v. Alleghany*, 25 Penn. St. 128; *Harvard College v. Aldermen*, 104 Mass. 470, 483; *People v. Utica Ins. Co.*, 15 Johns. 380; 8 London Jurist, 795; *Furman v. Mayor, etc.*, 5 Sandf. 16; *Bleeker v. Ballou*, 3 Wend. 264.) As the word "tax" always includes an assessment, unless the object of the law shows an opposite intention, the courts have ascertained this difference by the context and by considering the intention of the legislature. (*Matter of the Mayor, etc., of N. Y.*, 11 Johns. 77.) In determining what the word "taxation" means in this act of 1864, it is necessary to consider the circumstances which induced the legislature to pass the law. (*Burrill v. Boardman*, 43 N. Y. 257, 262; Laws 1864, p. 3, §§ 1, 2, fols. 44, 46; 1 R. S. 906, § 5 [5th ed.]) Unless limited in terms, or by the effect of collocation, recitals or coördinate provisions, an exemption from taxes by statute must imply freedom from the imposition of taxes, not only in the forms and modes already established and in use at the time, but in all forms and modes in which the legislature may from time to time see fit to exercise the power or authorize it to be exercised over property within its jurisdiction. (*Harvard College v. Aldermen*, 104 Mass. 470; *Matter of the Mayor, etc., of N. Y.*, 11 Johns. 77; *People v. Purdy*, 2 Hill, 39; *Lefevre v. Lefevre*, 59 N. Y. 448-9; *Buffalo Cemetery v. City of Buffalo*, 46 id. 506; *People v. Mayor of Brooklyn*, 4 N. Y. 419, 433, 434.) The assessment must be vacated, unless the defendants can show a lawful valuation for the purposes of taxation by the commissioner of taxes, because the statute for-

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bids any assessment to exceed one-half of the assessed value of the property, and if there has been no assessed valuation there can be no measure by which to determine the moiety allowed. (*Matter of the Second Avenue M. E. Church*, 66 N. Y. 395; Laws 1840, chap. 326, § 7; Valentine's Laws, p. 1278, §§ 7, 8; *Matter of Schell*, 76 N. Y. 433; *Harlem Presbyterian Church v. The Mayor*, 5 Hun, 444; *Matter of Second Ave. M. E. Church*, 66 N. Y. 399.) The sewer not being laid down on the plan devised by the Croton Aqueduct board, the assessment therefor is void. (*Matter of Protestant Episcopal School*, 46 N. Y. 178; *Matter of Blodgett*, MS. 1870; Laws 1865, chap. 381, p. 717, § 8.)

*D. J. Dean* for respondent. Exemption from taxation does not imply exemption from assessment for local improvement. (*Matter of the Mayor, etc.*, 11 Johns. 80; 1 R. S. 388; *Bleeker v. Ballou*, 3 Wend. 263; *Sharp v. Speir*, 4 Hill, 83; Cooley on Taxation, 1876, p. 147, note; *Buffalo Cemetery v. City of Buffalo*, 46 N. Y. 566; *Matter of College St.*, 8 R. I. 474; *Cronleap v. Copley*, 2 La. Ann. 329; *Northern Liberties v. St. John's Church*, 13 Penn. St. 104; *Lefevre v. Detroit*, 2 Mich. 586; *Second Universalist Soc. v. Providence*, 6 R. I. 235; *Beals v. Providence Rubber Co.*, 11 id. 383; *Ottawa v. Free Church*, 20 Ill. 423; *Sheehan v. Good Samaritan Hospital*, 5 Mo. 155; *Lockwood v. St. Louis*, 24 id. 20; *Baltimore v. Cemetery Co.*, 7 Md. 517; *Patterson v. Society, etc.*, 27 N. J. 185; *Bridgeport v. N. Y. & N. H. R. R. Co.*, 36 Conn. 255; *Guardian of Bedford Union v. Bedford*, 7 Exch. 777; *State v. Newark*, 27 N. J. 185; Cooley on Taxation, 146.) There is no provision of law in this State whereby "charitable institutions," either *eo nomine*, or any class of institutions established by private persons, whether under acts of incorporation or otherwise, which could fairly be included under the general designation of "charitable institutions," are exempted from assessment for local improvements. (Part 1, chap. 20, title 1, R. S.; 1 R. S. 583; Laws of 1853, chap. 122; Laws of 1869, chap. 708.) The prior valuation of the property by the ward



assessors, for the purposes of taxation, was entirely regular, and is sufficient to support this assessment up to the amount of one-half such prior valuation. (*Matter of St. Joseph's Asylum*, 69 N. Y. 353; *Matter of St. Mark's Church*, 2 Hun, 381, affirmed by Court of Appeals, 74 N. Y. 610; *Hebrew Benevolent Soc.*, 70 id. 476.) If the court consider it necessary that the sewer should be on a district map, in the absence of proof of its location, it will presume that it was east of the center line of Ninth avenue, and not in district One and a half, and that it was built in accordance with the plan of the adjoining district. (*Matter of Ingraham*, 64 N. Y. 310.) It was not necessary that the assessment for the sewer in question should be confirmed by the common council of the city of New York. (Laws of 1861, chap. 308.)

EARL, J. This action was commenced by the plaintiff to vacate and restrain the collection of an assessment imposed upon its land for the expense of a sewer.

James H. Roosevelt died in 1863, leaving a will in which he gave a large property to trustees named, for the purpose of founding and maintaining a hospital in the city of New York, and he directed the trustees to apply to the legislature for proper acts to incorporate, secure and perpetuate such hospital. In compliance with these directions the trustees applied to the legislature and by the act chapter 4 of the Laws of 1864, the plaintiff was incorporated.

By section 3 of the act it is provided that "the property, real and personal, of said corporation shall be exempt from taxation, and shall be entitled to the benefit of the provisions of law relative to charitable institutions."

In 1873 there was imposed upon the land of the plaintiff, owned and held by it for hospital purposes, an assessment of nearly \$10,000, for the expense of a sewer constructed near such land, and the claim of the plaintiff is, that its land was exempt from such assessment by virtue of the section cited. We agree with the courts below that this claim is not well-founded.

In a broad sense, taxes undoubtedly include assessments, and the right to impose assessments has its foundation in the taxing power of the government; and yet in practice, and as generally understood, there is a broad distinction between the two terms. Taxes, as the term is generally used, are public burdens imposed generally upon the inhabitants of the whole State, or upon some civil division thereof, for governmental purposes without reference to peculiar benefits to particular individuals or property. Assessments have reference to impositions for improvements which are specially beneficial to particular individuals or property and which are imposed in proportion to the particular benefits supposed to be conferred. They are justified only because the improvements confer special benefits and are just only when they are divided in proportion to such benefits.

What the legislature undoubtedly meant was to exempt the plaintiff from such taxation as it would, but for the exemption, have to share for governmental purposes with all the other persons in the ward or city or State. It cannot be supposed that it was intended to exempt it from assessments made for the expense of improvements specially beneficial to its property and to impose the whole of such expense upon other property or upon the public generally. If such had been the intention, the legislature would have used more comprehensive terms, particularly as it must be presumed to have known the wide distinction in the city of New York between taxes and assessments, and the fact that taxes and assessments were there imposed for different purposes, upon different systems and by different officers.

These views are fully sustained by authorities quite uniform. In *Matter of the Mayor, etc., of New York* (11 Johns. 80), certain churches claimed exemption from assessments for street improvements, under an act passed April 8, 1801, which exempted churches from being "taxed by any law of the State," and the exemption was denied on the ground that such assessments were not taxes within the meaning of the act. In *Bleecker v. Ballou* (3 Wend. 263), SAVAGE, Ch. J., speaking of

an assessment for street improvements, said there was no doubt that such an assessment was not a tax. In *Sharp v. Speir* (4 Hill, 76), it was held that a statute which authorized the sale of land for a tax did not authorize the sale for an assessment for benefits. In *Hassan v. City of Rochester* (67 N. Y. 528), it was held that the provisions of the Revised Statutes (1 R. S. 387, § 1) exempting from taxation lands belonging to the State did not exempt such lands from assessments for local improvements. Judge MILLER, writing the opinion, said: "A manifest distinction exists between taxes and assessments, which is distinctly recognized in the decisions. And it is held that an assessment is not a tax in many reported cases." (See, also, Oboley on Taxation, 147, where, in a note, many cases very much in point are collated.) This line of decisions, quite uniform in this State and elsewhere, may be supposed to have been known to the legislature, and its language to have been used in reference thereto.

There is nothing in conflict with the authorities cited in *Matter of Van Antwerp* (56 N. Y. 261). In that case it was decided that the right to impose an assessment for local improvements is based upon the taxing power possessed by the government, and that with reference to that power an assessment is a tax, and so, undoubtedly, it is. But the point here is that while taxes and assessments are both fundamentally based upon the taxing power, they are widely different species of taxation. In *Harvard College v. Aldermen of Boston* (104 Mass. 470), the college was held to be exempt from assessments for street improvements, under a provision in its charter which exempted its property from "all civil impositions, taxes and rates" — language much broader in its import than that used in plaintiffs charter.

The scope of the word *taxation*, as used in the charter, is not enlarged by a consideration of the object for which the plaintiff was incorporated. The object was the establishment "of a hospital for the reception and relief of sick and diseased persons, and its permanent endowment pursuant to the directions of the last will and testament of its founder." It can-

not be supposed that this object will be defeated by assessments made for benefits to its property from local improvements. It must be assumed that such assessments will be justly and fairly made, and that they will not exceed the benefits actually conferred. If they are not thus made, the plaintiff may resist them in the manner in which all citizens are obliged to fight against unjust, unequal and unfair taxation.

It is said that the purpose was to found a permanent hospital and that the permanency may be defeated if plaintiff's property is liable to be swept away by assessments, and that therefore the assessments should not be allowed. The attribute of permanency is a chartered privilege. The legislature did not undertake to guaranty the perpetuity of the hospital against all contingencies. Its property may be swept away by bad management, by debts lawfully created, or by assessments. But it cannot be supposed that the legislature intended to secure the permanency of the hospital, said to be endowed with several millions of dollars, by the exemption from taxation. In consideration of the public good which the hospital would accomplish and the charitable use to which its funds were to be devoted, the legislature simply intended that its funds should not be depleted by general taxes taken for public purposes. To comply with the founder's will, the legislature was required to grant a "liberal charter," and hence it is claimed that the exemption from taxation should be held also to exempt from assessments, and that unless it is so held the charter is not liberal within the meaning of the will. But the charter granted is a liberal one. It is perpetual. It enables the plaintiff to take and hold forever all the property devoted to it by the founder not only, but to take without limit property from other sources, and to hold without limit real and personal property. Besides this, all the immense property it may thus acquire is exempted from taxation for public purposes, and, in addition to all this, it is entitled to the benefit of all provisions of law relative to charitable institutions. Such a charter certainly cannot be characterized as illiberal, and it cannot be supposed that the legislature in-

tended, in order to conform to the will of the founder, to go further, and, for an unlimited amount of real estate in the city of New York, to create an exemption from assessments possessed by no other charitable institution in the State.

The exemption claimed finds no sanction in the general legislation of the State or in public policy. All colleges, churches, seminaries of learning, court-houses, jails, school-houses and even the lands of the State, unless by appropriate words specially exempted, are liable to be assessed for local improvements. In all cases where exemption from assessments is intended it is so expressly stated in the law. It is provided that "no tax or assessment" shall, at any time, be imposed upon the mint or assay office of the United States in the city of New York (1 R. S. 932, 933 [6th ed.]); and that "every poor-house, almshouse, or other place provided by any city or town or county for the reception and support of the poor, and all real and personal property whatever belonging to or connected with the same shall be exempt from all assessments and taxation levied either by the State or by any county, city, town or village." It has never been supposed that the real estate of a minister exempted by law from taxation was also exempt from assessments for local improvements.

There is a still further suggestion to be made. Laws exempting property from taxation are to be strictly construed. Taxation is the rule; exemption the exception, and before any one can claim exemption from what would otherwise be his just share of a tax or assessment, he must find a plain warrant for such exemption in the law. (*Buffalo Cemetery v. City of Buffalo*, 46 N. Y. 506.) In view of what has been said, it would certainly be going to an extraordinary length to say that the exemption from assessments in plaintiff's charter is plain or free from reasonable doubt. We must, therefore, hold that plaintiff's property, while exempt from taxation, is not exempt from improvement assessments.

The further claim is made that even if the plaintiff's land was not exempt from assessments, there was no basis for the assessments complained of, as there had been no previous val-

uation of the land for the purposes of taxation. (Laws of 1840, chap. 326, § 7; *Matter of Second Avenue M. E. Church*, 66 N. Y. 395.) This point was not taken on the trial. The defendant's counsel offered in evidence a book from the tax office in the city of New York, which, as is stated in the case as presented to us, "showed that the premises in question had been valued for the purposes of taxation in the year 1866, by the commissioners of taxes." This was objected to, not on the ground that it did not properly or sufficiently show the valuation of 1866 for the purposes of taxation, but upon the ground that the commissioners of taxes had no right to value the premises for the purposes of taxation in 1866 because the premises at that time belonged to the plaintiff and were exempt from taxation. The objection was overruled and the book received in evidence, and it showed a valuation in 1866 upon all the land affected by the assessments in question. It cannot now, therefore, be objected that the valuation was not sufficiently proved. That the valuation although made in 1866 was sufficient as a basis for the assessments is no longer open to dispute. (*Matter of St. Joseph's Asylum*, 69 N. Y. 353; *Matter of Hebrew Benevolent O. A. Society*, 70 id. 476; *Matter of St. Mark's Church*, 11 Hun, 381; affirmed in this court, 74 N. Y. 610.) Besides if the plaintiff claimed that there was no basis in the prior valuation for these assessments it should have shown it. This it did not attempt to do.

(Dissenting.) But a further objection to these assessments is made which seems to me to be insuperable. The assessments were laid for a sewer in Ninth avenue between Fifty-fifth and Fifty-seventh streets and in Fifty-seventh and Fifty-eighth streets. The objection is that no sewer in Ninth avenue between the two streets named is laid down on the plan devised by the Croton Aqueduct board and hence that the sewer was unlawful under section 8 of the act chapter 381 of the Laws of 1865. Section 1 of that act provides that the Croton Aqueduct board shall have power to devise and frame a plan of sewerage and drainage of the whole city. Section 2 provides that the board shall lay out the city into as many sewerage districts as they may

deem necessary for the purposes of drainage, and that they shall also determine and show on suitable maps or plans the location, course, size and grade of each sewer and drain proposed for each of the districts and the proposed alterations and improvements in existing sewers, and that they shall also determine and show on said maps or plans the contemplated depth of the sewers below the surface and the established grades of the streets and avenues in each district, and such other particulars as may be necessary for the purpose of exhibiting a complete plan of the proposed sewerage therein. Section 4 provides that upon the completion of the map or plan for the drainage of any sewerage district such map or plan shall be the permanent plan for the sewerage of such district, subject, however, to such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue or part thereof in said district or otherwise; that copies of such complete plans shall be made and filed by the board in the offices of the common council, the comptroller, street commissioner and city inspector. Section 5 provides that upon the completion of the plan of sewerage and the filing copies thereof as required in section 4, or as soon thereafter as may be convenient, the board shall cause printed specifications to be made in accordance with the plan of the work proposed to be done in the district, and shall thereupon invite proposals and shall contract for the whole or any part of the work in the district. Sections 6 and 7 provide for payment of the expenses of the work, by assessments upon lands benefited. Section 8 provides as follows: "It shall not be lawful hereafter to construct any sewer or drain in the city of New York unless such sewer or drain shall be in accordance with the general plan devised by said Croton Aqueduct board for the sewerage of the particular district in which such sewer or drain is proposed to be constructed."

Now, what plan was meant in section 8? Evidently the plan mentioned in section 2, showing the location, course, size, grade and depth of the sewer — the same plan required to be filed by section 4. No other plan is spoken of in the

act, and manifestly no other plan would answer the purposes of the act. Unless this sewer was in accordance with such plan, its construction was absolutely prohibited by section 8, and a valid assessment for its construction could not be laid. (*Matter of the Protestant Episcopal School*, 46 N. Y. 178; *Matter of Mayer*, 50 id. 504.)

Upon the trial the plaintiff proved a map, showing the plan of the sewerage district, in which this sewer was constructed. There was no dispute upon the trial that the plan thus proved was the plan of that sewerage district, and it was undisputed that this sewer in Ninth avenue, between the streets named, was in no way laid down or indicated upon that map, and the court, at Special Term, so found. But it also found that "in no other respect does it appear that the said sewer was not in accordance with the general plan adopted in said district." In what other respect could it appear? It does not appear on the plan in any way. There is no room for presumptions. The plan is proved and it does not appear there. But it is said, in the opinion at General Term, that it was sufficient under the act of 1865 if there was a general plan of the sewerage district in which the sewer was constructed, and that it was not necessary for the line of this sewer to be indicated thereon. We cannot assent to this. It passes our comprehension how this sewer can be said to have been constructed according to a plan upon which it is in no way mentioned or indicated, particularly when the plan is required to show the location and course of every sewer.

The last objection to these assessments must, therefore, be sustained and the judgment must be reversed and new trial granted.

FOLGER, Ch. J. I am not able to agree that this assessment is open to the objection that the construction of this sewer was forbidden by the act of 1865. It may be conceded that no sewer can be lawfully constructed, nor even a contract made therefor, or notice put out for bids and proposals to do the work, until a general plan for the sewerage of the district has



been devised, and maps made and filed on which that plan is shown. No case yet decided by this court has gone farther than that. (*In re Blodgett*, MS. 1870; *In re Prot. Epis. Pub. School*, 46 N. Y. 178; *In re Mayer*, 50 id. 504.) It has not yet been held, that after a general plan has been devised and a map filed, there may not legally be made an alteration in the plan, or an addition to the sewers proposed by it. The fourth section of the act (chap. 381, of 1865, pp. 715-16) permits such subsequent modification as may become necessary in consequence of alteration made in the grade of any street, or otherwise. We think that the permission to subsequently modify is not confined to a necessity arising from an alteration of grade of street. An application of the maxim *noscitur a sociis*, though made to the word "otherwise" would not restrict it so that it would not cover the case of the opening of a new street in a district already brought within a general plan, and laid down on a map, or the case of a sewer newly proposed for an old street lying within the district and appearing on the map made. The plan that is to be made is to be a general one, that shall show the complete plan proposed. (§ 2.) Though each sewer proposed when the plan is made is to be shown on the map, it is not meant that no other sewer shall ever be made than one that is thus shown. A complete plan will be made, when the location, course, size and grade of each sewer deemed needful for the district when the plan is devised is shown on the map. And such a plan and a map must precede the construction of any sewer. But if the needs of the district, or any part of it, call for more sewers or another sewer, there is not a prohibition against making them or it. The prohibition is against making them or it, out of accordance with the general plan, so that the size, the course, the grade shall be kept in conformity with those conditions of the sewers laid down on the general plan.

The object was uniformity, so that all sewers in a district might act with like effect, and none in opposition to another or some others. When the location, course, size and grade of several sewers in a district had been determined upon, and the

plan set down on a map, there was a general system of construction established for the district that would effect uniformity of operation and result.

If a new sewer should be built, not in accord with the general plan in these conditions, want of co-operation in action would probably result. Hence it was well to put into the statute, the section (§ 8) forbidding the construction of any sewer unless it should be in accordance with the general plan for the particular district in which it is proposed to build it. This section harmonizes with the fourth (*supra*), so that uniformity in general design and mode is preserved, while an emergency or newly-arising need may be met and satisfied. It would not have needed the eighth section, but for the provision in the fourth. For the provisions of the sections from the first to the fifth inclusive must be observed as conditions precedent, before work could be done or begun on a sewer, as was held in the cases cited above. But the fourth section containing the exceptions for a necessity not foreseen and provided for, lest that should be used to interrupt uniformity in general characteristics and operation, the eighth section was added, enjoining general uniformity.

We are of the opinion, therefore, that it is not enough for the purpose of vitiating an assessment to show a map that does not display the particular sewer complained of unless it is also shown, either that that sewer does not accord in its characteristics with that general plan, or that there has been no general plan devised and mapped and filed.

Agreeing with my brother, EARL, J., in the other points discussed in his opinion, I think that the order appealed from should be affirmed.

All concur with EARL, J., as to the two points first discussed in his opinion; all concur with FOLGER, Ch. J., as to the third point, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

## Statement of case.

DAVID DOWS et al., Respondents, v. HENRY P. KIDDER et al.,  
Appellants.

Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. At that time they had in their hands of the purchase-price of the exchange more than the value of the corn. In an action for the conversion of the corn, the defense was that defendants bought and paid for the corn in good faith without notice; *held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiffs' demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a portion of the purchase-money before notice of plaintiffs' claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment.

Also, *held*, that the fact that other moneys were mingled with the proceeds of plaintiffs' property did not impair their right.

Also, *held*, that the claim that the money in defendants' hands represented in part the price of bills of exchange drawn against other property as to which defendants were in the same position was not tenable; that the question between the parties must stand as of the date when plaintiffs made their demand, and a payment then would have been good against every one, no demand by other claimants having then been made.

Also that such a claim was not within the issues but was inconsistent with the answer.

*It seems* that if defendants were likely to be vexed by conflicting claims, they had a remedy by action of interpleader, or might have had the other claimants brought in as parties to this action.

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It was objected that if plaintiffs had a cause of action, it was not by action in the nature of trover. *Held*, that as no question of the kind was raised upon the trial, it was not tenable here.

*De Mott v. Starkey* (3 Barb. Ch. 408), *Weaver v. Barden* (49 N. Y. 286), *M. & T. Nat. Bank v. Crow* (60 id. 85), distinguished.

(Argued December 17, 1880; decided February 11, 1881.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made December 2, 1879, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover damages for the alleged conversion of a quantity of corn. The answer alleged in substance that defendants purchased of one Atkinson, in the usual course of business, sixteen bills of exchange, and among them three bills of exchange drawn against the corn then shipped on board a vessel, receiving the bills of lading therefor as collateral, and that defendants paid for said bills of exchange in good faith, before notice of plaintiffs' claim.

The facts found by the referee are substantially as follows:

On the 24th day of July, 1876, plaintiffs agreed to sell to Thomas Atkinson, doing business under the name of Thomas Atkinson & Co., and said Atkinson agreed to buy 50,000 bushels of corn, to be delivered during the first half of August to buyer's vessel or store, payment to be made in cash on delivery. On the 10th and 11th days of August, 1876, on request of said Atkinson, plaintiffs caused 24,869 $\frac{3}{4}$  bushels of the corn, to be delivered on board the bark "Emilio Ciampa," then being at Brooklyn, in the port of New York, and bound to Cork for orders; said corn was put on board, for account and to be held for account of plaintiffs; plaintiffs, as owners of said corn, according to the usual course of business, received the return of the official weigher dated August 11th, showing the delivery of the said quantity of corn on board; the price of said corn at the sale agreed on, with customary proportion of expenses, amounted to \$13,802.61, for which a bill was rendered at the time of the delivery of the weigher's return for payment to be made in cash. On the 12th day of August

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plaintiffs made a conditional delivery of said corn to Atkinson by delivering to him the weigher's return indorsed by plaintiffs, the condition of such delivery being by standing agreement between Atkinson and plaintiffs that the title to said corn should not pass until the payment of the price, in cash, which agreement was supplemented by a special promise at the time of delivery to give a check for the amount of the bill at two o'clock of the same day. The title papers for said corn were indorsed by plaintiffs and delivered to Atkinson for the purpose of enabling him to procure bills of lading, in his own name, and to prepare and sell his exchange drawn against the same. A check for the price of said corn was demanded by plaintiffs of Atkinson on the same day and was refused, and thereupon the return of the corn or of the bills of lading therefor was also demanded of said Atkinson and refused. Atkinson, on the same day, failed and made a general assignment for the benefit of his creditors. Atkinson, by means of the said weigher's certificate, so indorsed to him by plaintiffs, procured from the master of said bark bills of lading for the corn, three in number, in the name of Thomas Atkinson & Co., as shippers, and on the same day transferred the same to defendants, as security for three bills of exchange for £2,050 sterling, drawn by said Thomas Atkinson & Co., against said corn, and forming part of a parcel of exchange amounting to £6,725 sterling that day, sold to defendants by Atkinson at the aggregate price of \$36,331.81. Defendants paid to Atkinson, on account of said purchase, \$17,000. By the mail which closed at half-past one of that day defendants forwarded the bills of exchange and bills of lading, with suitable indorsement or other transfer to their agents or correspondents in London. Afterward, on the same day, plaintiffs notified defendants that they were the owners of the corn, and demanded the same, or the bills of lading therefor, or that defendants should agree to account to plaintiffs for the value or the proceeds thereof. At the time of such demand defendants had in their own hands, of the price of the said exchange, more than \$19,000, being much more than the whole value of the said corn. Defend-

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ants neglected and refused to comply with any of the said demands. At the time of the said purchase and of their receiving the bills of exchange and bills of lading, defendants had no notice of the insolvency of Atkinson, and had no notice or reason to suspect that he was not acting in his own behalf and in entire good faith, and had no notice or reason to suspect that plaintiffs had any interest in or claim upon said corn, or any part thereof.

Upon the request of counsel for the defendants the referee further found, among other things —

“That Atkinson delivered to defendants with such exchange all the bills of lading for said merchandise, including the bills of lading for the corn, and usual documents, except certain bills of lading representing bacon, and requested a check for \$17,000 on account of the transaction, which defendants gave him.

“That soon thereafter the bills of lading for the bacon were delivered to defendants, and the transaction between defendants and Atkinson was completed on Atkinson's part.

“That, to complete the sale and purchase of the exchange, there remained to be paid by defendants to Atkinson the sum of \$19,331.81, balance of the price of the exchange.

“That about two P. M. the same day, Atkinson called at defendants' office, and then received their check for said balance, \$19,331.81, which he immediately indorsed and handed back to defendants, requesting that it be passed to his credit, as additional margin, to protect defendants from losses likely to occur on prior transactions, and defendants received the said check so indorsed and passed the amount to Atkinson's credit, as requested.

“That at the time when defendants so gave and received back the said check, they had no knowledge or notice of any claim, on the part of plaintiffs, to the corn in question.

“That thereafter plaintiffs demanded of defendants the corn in question, or its value, and defendants refused to comply with the demand.

“That thereafter, namely, August 15, and on August 22,

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similar demands were made upon defendants by other creditors of Atkinson, for other merchandise purporting to have been represented by bills of lading accompanying the exchange, sold by Atkinson to defendants, as aforesaid, which demands amounted to \$11,779.64."

On request of plaintiffs' counsel, the referee further found —

"That plaintiffs' demand was renewed on Monday, August 14, and that the defendants were willing, and offered to pay to plaintiffs the price of the exchange drawn against the corn, if Atkinson would consent; that Atkinson refused to consent, and thereupon defendants refused to pay to plaintiffs the price of such exchange, and retained possession of the corn without agreeing to account for the same to plaintiffs."

*E. T. Rice* for appellants. Although the sale of the corn was a cash sale, delivery was made without requiring payment, and the defendants acquired a good title discharged of the lien for the purchase-money. (*Rawles v. Deshler*, 3 Keyes, 572; *Comer v. Cunningham*, 77 N. Y. 391; *Fitzgerald v. Fuller*, 19 Hun, 180; *Parker v. Baxter*, id. 410; 1 R. S., marg. 774, § 3.) The defendants' exception to the referee's conclusion of law, that they had not paid Atkinson for the corn, nor for the exchange drawn against it, nor for any part thereof, was well taken. (*Winne v. McDonald*, 39 N. Y. 233.) The conclusion of law of the referee, that defendants had no greater equities against plaintiffs than Atkinson had, was erroneous. (*The President, etc., of Westfield Bk. v. Corning*, 31 N. Y. 320; *Root v. French*, 13 Wend. 570; *Rawles v. Deshler*, *supra*; *Exchange Bk. v. Monteath*, 26 N. Y. 505, 513.) By the payment of part of the purchase-money for the exchange before notice of plaintiffs' claim the defendants were entitled to protection as *bona fide* purchasers. (*De Mott v. Starkey*, 3 Barb. Ch. 403, 406; *Weaver v. Bardin*, 49 N. Y. 286, 291; *Mech. & Traders' Bk. v. Crow*, 60 id. 85.) In the absence of fraud or collusion on the part of defendants with Atkinson, defendants had a right to complete their purchase of the exchange by paying Atkinson the balance due him for the exchange without im-

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pairing their security. (*Lickbarrow v. Mason*, 1 Smith's L. Cas. 1039 [marg p. 848]; *Marine Bk. v. Wright*, 48 N. Y. 1.) Whether the sale and delivery were induced by fraud or not on Atkinson's part makes no difference with regard to defendants' title, because the property had been delivered to Atkinson voluntarily and in pursuance of an actual sale made some weeks before, and the defendants had in good faith advanced money upon the credit of the property. (*Paddon v. Taylor*, 44 N. Y. 371.) The power given by the vendors (plaintiffs) to the vendee (Atkinson), and exercised by him in the sale of the exchange to defendants, on security of the corn, was inconsistent with continued ownership of the corn by plaintiffs, and estopped them from reclaiming the property from defendants. (*Lud-den v. Hazen*, 31 Barb. 650; *Smith v. Lynes*, 1 Seld. 41; *Paddon v. Taylor*, 44 N. Y. 371.) To render a demand and refusal equivalent to direct proof of conversion, it should appear that defendants were in actual possession of the property at the time of demand or had previously parted with the goods fraudulently, or had wrongfully converted them to their own use. (*Andrews v. Shattuck*, 32 Barb. 396.)

*C. Van Santvoord* for respondents. Where a delivery on a sale for cash is made before payment, conditionally or upon a trust, the vendor may reclaim the property against the vendee, or any transferee of his who has not made advances of money on the faith thereof as a *bona fide* purchaser. (*Dows v. Dennistoun*, 28 Barb. 393; *Fleeman v. McKean*, 25 id. 479.) Upon a sale of goods for cash to be paid on delivery, the title does not vest in the purchaser upon actual delivery without payment, unless the condition is waived. (*Smith v. Lynes*, 5 N. Y. 41; reversing 3 Sandf. 203; *Strong v. Taylor*, 2 Hill, 326; *Fleeman v. McKean*, 25 Barb. 474.) A delivery of property on condition that title shall not pass unless the price is paid at a set time, and that if it is not, the seller may resume possession, does not transfer the title. (*Herring v. Hoppock*, 15 N. Y. 409; affirming 3 Duer, 20; 12 N. Y. Leg. Obs. 167; *Herring v. Willard*, 2 Sandf. 418; *Piser v. Stearns*, 1 Hilt. 86.)



Delivery of goods sold for cash is not necessarily a waiver of the condition. The seller has a right to explain the delivery by evidence. (*Fleeman v. McKean*, 25 Barb. 474.) It is not necessary to a qualified or conditional delivery that the qualification or condition intended to be annexed to the delivery should at the time be declared by the vendor in express terms. (*Smith v. Lynes*, *supra*; *Buck v. Grimshaw*, 1 Edw. 140; *Keeler v. Field*, 1 Paige, 312; *Haggerty v. Duane*, id. 321; *Van Nest v. Conover*, 8 Barb. 509; *Leven v. Smith*, 1 Den. 571; *Haye v. Currie*, 3 Sandf. Ch. 585; *Root v. French*, 13 Wend. 570; *Barnard v. Campbell*, 55 N. Y. 456; 58 id. 73; *Bassett v. Spofford*, 45 id. 387, 391.) Conditions as to title follow a delivery to a purchaser, and will be enforced even against a *bona fide* purchaser parting with value. (*Dows v. Nat. Bk. of Milwaukee*, 1 Otto, 618; *The F. & M. Nat. Bk. of Buffalo v. Hazeltine*, 78 N. Y. 104.) To constitute one a *bona fide* purchaser, within the rule for the protection of a *bona fide* purchaser against a prior equity, the conveyance must be executed and the purchase-money actually paid before notice. (*Dows v. Dennistoun*, *supra*; *Basset v. Norworthy*, 2 W. & T. L. Cases [5th ed.], Lond. 1877, p. 6; Sugden on Vendors [14th ed. by Sugd.]; 8th Am. by J. C. Perkins, Phil. 1873, vol. 2, 522, 523 [752, 753]; *Heatley v. Finster*, 2 Johns. Ch. 159; *Jewett v. Palmer*, 7 id. 65, 68; *Clark v. Mauran*, 3 Paige, 373.)

DANFORTH, J. Upon the facts found by the referee it is plain that no title to the corn passed from the plaintiffs to Atkinson or to Atkinson & Co. There was an agreement to sell, but payment was to be made in cash upon delivery. Payment was thus made a condition precedent, and until the condition was performed the title could not be affected. (*Russell v. Minor*, 22 Wend. 662; *Leven v. Smith*, 1 Den. 571; *Fleeman v. McKean*, 25 Barb. 479; *Dows v. Dennistoun*, 28 id. 393.) Nor was this condition waived by the symbolical delivery of the corn to Atkinson by putting in his hands the title papers therefor, for this was also done upon condition that the title should not pass until payment of the price in cash. (Cor-

lies v. *Gardner*, 2 Hall, 374; *Hammett v. Linneman*, 48 N. Y. 399; *Herring v. Hoppock*, 15 id. 409; *Cole v. Mann*, 62 id. 4.) But as Atkinson was thus enabled by the plaintiffs to assume possession and the apparent ownership of the corn, third persons had a right to consider it as his, and the plaintiffs are estopped as against any one who, without notice that the condition had not been performed, made advances thereon as pledgee or purchaser in the belief that the apparent title was the real title and the ownership absolute. (*Saltus v. Everett*, 20 Wend. 267; *Smith v. Lynes*, 5 N. Y. 41; *Paddon v. Taylor*, 44 id. 371; *Comer v. Cunningham*, 77 id. 391.)

The defendants claim to be in that position. By the answer in this action they allege that on the 12th day of August, 1876, they bought of Atkinson, in the usual course of business, sixteen bills of exchange drawn by him against merchandise of various kinds and among others, three bills of exchange drawn against corn then on shipboard, and received therewith bills of lading representing the said corn as collateral security for said bills of exchange; that they took these bills in good faith and paid therefor, without notice of "or reason to suspect that the plaintiffs had any interest in or claim upon said corn or any part thereof." And except the fact of payment, this claim may also stand upon the findings of the referee. As to that, he finds the aggregate amount of exchange so purchased was £6,725; that the three bills drawn against the corn amounted to £2,050, and form part of the £6,725, and for this the whole price to be paid was \$36,331.81; that on account of said purchase "the defendants paid to Atkinson \$17,000 and no more"; that afterward and on the same day, the plaintiffs notified the defendants that they were the owners of the corn, and demanded the same or the bills of lading therefor, or that defendants should agree to account to plaintiffs for the value or the proceeds thereof; that the value of the corn was \$13,802.61, and that at the time of this demand there remained in the defendants' hands of the price of said bills of exchange more than \$19,000; and that the defendants refused to comply with either of the plaintiffs' demands. At this time also, although the corn had been shipped, the

vessel was still in port, and the bills of lading were under the control of the defendants, for they had but a few hours before been mailed by them to their agents and correspondents; and therefore to the extent of the unpaid portion of the price agreed to be paid for the bills of exchange, the defendants had in their possession sufficient means of protecting not only themselves but the plaintiffs from loss, and their refusal to comply with the plaintiffs' demand seems to be without excuse or justification within the rule relied upon. They stand on Atkinson's title as to the money in their hands, and seek to retain that which he was bound to pay over before his title could be perfected.

The corn when shipped was put on board the vessel "for account and to be held for account of plaintiffs." The weigher's return, showing the quantity of the corn and its delivery upon the vessel, was transferred by the plaintiffs to Atkinson, not only upon the condition before stated, but for the purpose of enabling him to procure bills of lading for the same, "and to prepare and sell his exchange drawn against" it, and the proceeds to the amount of the price of the corn were to be thereupon paid to the plaintiffs. These things were accomplished. The bill of lading was transferred by Atkinson to the defendants as security for the bills drawn by him. The defendants bought this with other exchange, and at the time of the demand had not paid him therefor. So far as the money in their hands is made up in any part from the proceeds of the plaintiffs' corn, I am unable to see how the position of the defendants is better than Atkinson's. So far as it contains the price, or any part of the price, which the defendants agreed to pay Atkinson for the bills of exchange, or so far as it is money agreed to be advanced upon the strength of the security afforded by the bills of lading written for the plaintiffs' corn, how is the defendants' title better than that of Atkinson's? To that extent, in whichever of these ways arising, it is the proceeds of the plaintiffs' property. As such it could be followed if it remained in Atkinson's hands, and there is no reason, in right or justice, why it should not in like manner be

taken from those of the defendants. So long as the money is in their hands, it does not matter that the property was received from Atkinson without notice of the plaintiffs' claim or equity. The proceeds of the plaintiffs' property belong to them. Atkinson may be considered as the plaintiffs' trustee or agent, for the purpose of disposing of the property and procuring the advances; and in either view, the plaintiffs, as principals, or as *cestuis que trust*, would be entitled to the price, or the money agreed to be advanced. (*Scott v. Surman*, Willes, 407; *Rodriguez v. Heffernan*, 5 Johns. Ch. 430; *Taintor v. Prendergast*, 3 Hill, 72; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Kelley v. Munson*, 7 Mass. 319; *Sheffer v. Montgomery*, 65 Penn. St. 329; *F. & M. Nat. Bk. v. King*, 57 id. 202; *Lemcke v. Booth*, 47 Mo. 385.) The trust is implied *in invitum*, or is "forced upon the conscience" by mere operation of law (2 Story's Eq. Jur., § 1254), for the reason that the defendants have money in their hands which they cannot conscientiously withhold. (Com. Dig., Chap. 2 A. 1; *id.* 4 W. 5.) It cannot be doubted that if the corn had come into the defendants' hands with notice of the condition on which Atkinson held it, they would be bound to perform it, or hold the property subject to the condition, as Atkinson held it. The same principle which requires this subjects the defendants to the rights of the plaintiffs, as the true owners of the property to its proceeds; and the fund in the defendants' hands is in like manner liable to the rights of the plaintiffs, in the same degree as if it was in the hands of Atkinson. Its conversion into money, or into any other kind of property, can make no difference with the plaintiffs' rights or the defendants' liability, either at law or in equity. (Story's Eq. Jur., *ante*, §§ 1255, 1256, 1257, 1258.) Judge STORY there declares the general proposition, "that if any property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust or give the agent or trustee converting it, or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice), any more valid

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claim in respect to it than they respectively had before such change." *Scott v. Surman* (Willes, 407) was an action against the assignees of a factor who had sold goods contrary to directions; and the court say: "A man may in many cases consider another as a wrong-doer or as a receiver of money to his use, as he thinks best and most for his advantage," and "the owner may come either against the vendee or the factor at his election; and the plaintiffs by this action have chosen to confirm the sale." In *Merrill v. The Bank of Norfolk* (19 Pick. 32), the plaintiff had sent to one Lamson, a broker, a quantity of lumber for sale; in part payment the broker took a note, procured it to be discounted by the defendant and the proceeds placed to his credit; afterward and on the same day the proceeds were attached by creditors of Lamson, and the plaintiff after demand brought an action against the bank for the amount of the note. The defendant set up the attachment, but the plaintiff recovered. The court say: "Giving credit for the proceeds to the factor did not divest the plaintiff of his property. It did not amount to payment; and nothing short of payment, either to the plaintiff or his agent, would discharge the defendants from their liability. The plaintiff may follow the property, however it may change form, or in whosoever hands it may be found, until his rights be divested by his own act or authority. The defendants having the plaintiffs' money in their hands, for which a demand was made before the action was commenced, are liable for the amount." In like manner, in the case before us, the defendants must be regarded as holding the proceeds in place of the property, and therefore liable to pay them over to the plaintiffs as the rightful owners, and this conclusion is sustained by the principle declared in *Van Alen v. Am. Nat. Bank* (52 N. Y. 1), to be well settled, that so long as money or property belonging to the principal, or the proceeds thereof, may be traced or distinguished in the hands of the agent or his representatives or assignees, the principal is entitled to recover it unless it has been transferred for value without notice; and the case itself sustains the doctrine. To the same effect are *U. S. v. State Bank* (96

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U. S. 30); *Caussidiere v. Beers* (2 Keyes, 198); *Cobb v. Dows* (10 N. Y. 341). Nor does the fact that other moneys are mingled with the proceeds of the plaintiffs' property impair their right. *Van Alen's* case is to that effect, and so are many cases therein referred to or cited. In one of them (*Pennell v. Deffell*, 4 De G. M. & G. 372), the court say: "It may indeed increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle." No such difficulty was suggested by the defendants. Upon demand made they not only refused to return the bills of lading or corn, but even to account for its value or the proceeds thereof. The plaintiffs' rights are denied, and it may be said here, as was said by the late chief judge in *Van Alen's* case, *supra*: "The defendant occupies the position of objecting to the title of the plaintiff without having or claiming any title itself." Indeed a further finding of the referee shows that when on a subsequent day the demand was renewed, "the defendants offered to pay the price of the exchange drawn against the corn, if Atkinson would consent; that he refused to consent, and they thereupon refused to pay the price of the exchange, and retained possession of the corn without agreeing to account for the same to the plaintiffs." It is apparent that with notice of the plaintiffs' rights and power, without injury to themselves to respond thereto, they put their refusal only on the ground of Atkinson's refusal. That does not justify them. They withheld it after notice of the trust, and cannot stand on this refusal, without showing that Atkinson had a right to make it. This they have not done. The money was at first in their hands as the money of Atkinson. They may be regarded as his bankers; and so far as they paid it out without notice that it did not belong to him, or that others were entitled to it, they are to be protected. (*School Dist. v. First Nat. Bank*, 102 Mass. 174, and cases *infra*.) This would apply to the \$17,000 paid upon his check. But the sum remaining may be followed by the true owner. (2 Story's Eq. Jur., § 1258; *Pennell v. Deffell*, *supra*; *Ex parte Cooke*, L. R., 4 Ch. Div. 123; *F. & M. Nat. Bank v. King*, 57 Penn. St.

202.) In the case last cited it was held, that when a principal can show that the money had been placed in the hands of another by his agent, it is no objection to the owner's claim that the other has promised to pay the agent; it would follow that the refusal of the agent to consent to payment to the principal would be no protection to the holder of the money against a claim made by the real owner. Atkinson acquired no rights by his abuse of trust, and could confer none upon the defendants, except as they became *bona fide* purchasers for value and without notice. This was not the defendants' relation to the \$19,000.

Upon the same facts it follows that the principle relied upon by the learned counsel for the appellants, viz., that when one of two innocent persons must lose by the act of a third, the loss should fall on the one through whose trust or confidence the wrong was committed, has no application to this case, for neither of the parties need suffer any loss. The defendants have in their hands money which they have no right to retain. They must pay it over to some one — either to Atkinson, or his representatives, or the plaintiffs. Atkinson could not complain that it was paid to the plaintiffs; nor could the defendants be required to pay it to him again.

But it is said that this money represents, in part, the price of bills of exchange drawn against other property; and that "the defendants are in the same position as to all the exchange and all the merchandise." The force of this objection, however, is not apparent. The defendants were not called upon to decide between conflicting claimants to this money. The plaintiffs gave notice of their rights and made their demand on the twelfth day of August; and the question between them and the defendants must stand as of that time. A payment then would have been good against every one. It is true that the referee, at the request of the defendants' counsel, found that afterward, viz., on the fifteenth and twenty-second of August, similar demands, amounting to \$11,779.64, were made upon defendants by other creditors of Atkinson for other merchandise, purporting to have been represented by bills of

lading accompanying the exchange sold by him to the defendants. But this falls short of a finding that the claims rested on the same ground as that of the plaintiffs, or that the claims were valid. Yet, if this might be inferred, such finding is not only not within any issue in the action, or any allegation or defense set up in the answer, but the defense suggested by the fact found or implied is inconsistent with the answer. If, as is in that pleading alleged, the defendants actually paid Atkinson for the exchange, or advanced, upon the security of the corn, the full amount of the bills of exchange, before notice of plaintiffs' equity or their demand, the claims of others, whether like the plaintiffs' or not, would be in no view material. Again, the action was not commenced until October, and the fact found, if relied upon and valid, should have been stated. If the necessary facts existed, if the defendants were vexed or likely to be vexed by conflicting claims of two or more persons, they had a remedy by action of interpleader, and might have stayed proceedings in this action until the rights of the different claimants had been determined. In such an action they would disclaim any personal interest, and by payment into court, or otherwise, submit the fund to its disposal. This is not the attitude of the defendants. In this action they assert a personal ownership of the bills of exchange, with the corn as security, and payment of the whole amount. In such a case an action of interpleader would not lie. Again, if there was merit in the suggestion that the rights of other persons were involved in this fund, the defendants might have had them brought in as parties to the controversy. (Code, § 122.) That they have resorted to neither remedy, nor set up the conflicting claims by answer, permits the inference that none exist. For aught that appears, the bills of exchange have been paid; and if others ever had an interest in the proceeds, it has in some way been terminated. Having forborne to adopt either mode of proceeding, and having offered to pay over the money upon Atkinson's direction, the defendants thereby identified themselves with Atkinson, and must stand or fall with his title. (*Wilson v. Anderton*, 1 Barn. & Ad.



450 [20 Eng. Com. Law, 426]; *Hoffman v. Conner*, 76 N. Y. 121; 12 L. J. [N. S.] 117.)

It is, however, urged by the learned counsel for the appellants, that "by payment of part of the purchase-money for the exchange before notice of plaintiffs' claim, the defendants were entitled to protection as *bona fide* purchasers." If this means to the amount paid, it is a correct statement of the rule. But I understand the claim to be that they can therefore hold all the purchase-money. This does not seem to be so upon principle, and the cases cited by him fall short of that conclusion. They are *DeMott v. Starkey* (3 Barb. Ch. 403), *Weaver v. Barden* (49 N. Y. 286), *M. & T. Nat. Bank v. Crow* (60 id. 85). In the first, the note was purchased after notice of its invalidity, and the partial payment made was held to have been wrongful and insufficient to sustain a title. It is true the Chancellor says: To entitle a party to the character of a *bona fide* purchaser without notice, he must not only have obtained the legal title to the property, "but he must have paid the purchase-money, or some part thereof at least, before he had notice of such prior right," and this is repeated in *Weaver v. Barden*; but here its meaning and extent appear, for it is added that such an one "is entitled to a lien to the amount of the consideration paid, and to a repayment of that amount, before he will be required to reconvey the stock" — the property then in question. While in the third, the note in question was paid for in full, in money or by canceling and giving up another note. The substance of the transaction here is that the plaintiffs' property was in part the consideration for the bills of exchange, and they are entitled to so much of the price agreed to be paid therefor by the defendants as will make them whole. But in whatever aspect the case is regarded, the conclusion of the learned referee was correct.

It is now objected "that if the plaintiffs had any cause of action against the defendants, it was not in trover, nor by an action in the nature of trover." No question of this kind, however, appears to have been raised upon the trial, and the findings of the referee were so made as to present all the facts in the

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case which either party thought material. It is too late now to suggest a variance, even if it would otherwise have availed. (*Tyng v. Com. Warehouse Co.*, 58 N. Y. 308.)

The judgment appealed from should be affirmed.

All concur, except FOLGER, Ch. J., and EARL and FINCH, JJ., dissenting.

Judgment affirmed.

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WILLIAM S. LIVINGSTON, JR., et al., as Executors, etc., Respondents, v. WILLIAM GORDON et al., Appellants.

The will of McC. gave to his executors \$32,000 in trust to invest and pay the interest to "the New York Home for the Blind, of 219 West Fourteenth street, so long as that institution shall maintain and care for William Gordon, now an inmate of that institution," and in case he was so cared for and maintained during his life, at his death the principal was to be paid to said institution; in case it ceased "to exist or to maintain an institution suitable for the care of the blind" during the life of Gordon, then the income was to be paid to any other society who would maintain and care for him which he might select, the principal to be paid to the society maintaining and caring for him at the time of his death. At the time the will was executed Gordon was an inmate of the institution maintained at 219 West Fourteenth street by defendant—the Society for the Relief of the Destitute Blind; but before the death of the testator, Gordon was expelled for violation of the rules of the institution; after such death, however, upon learning of the provisions of the will, the society offered to care for and maintain him in its institution or elsewhere; this he refused; he selected the defendant, The St. Joseph's Home, which has since cared for and maintained him. In an action for a construction of the will, *held*, that the bequest was valid and the said society was entitled to it if willing to conform to the conditions imposed; that the expulsion of Gordon prior to the death of the testator did not affect its right after his death; and, it having offered to perform the condition, was entitled to the legacy, its right not being affected by Gordon's refusal of the offer.

Also *held*, that a provision in the judgment directing as to the disposition of the fund in case of failure of or unwillingness on the part of the society hereafter to care for and support Gordon was unauthorized; that such disposition could only be properly made upon the happening of the contingency.

(Argued January 26, 1881; decided February 11, 1881.)

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APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 22, 1880, affirming a judgment entered upon a decision of the court on trial at Special Term.

This action was brought to obtain a construction of a provision in the will of Ernest S. McCrackan, deceased.

This will was dated the 11th day of October, 1875; the testator died in February, 1878. The provision of the will referred to is as follows: "I give and devise to my executors the sum of \$32,000 in trust to invest the same and pay the interest thereof semi-annually to the New York Home for the Blind, at No. 219 West Fourteenth street, so long as that institution shall maintain and care for William Gordon, now an inmate of that institution, and in case he shall be so cared for and maintained during the balance of his life, then in trust to pay the principal sum of said \$32,000 to said institution. And in case the said society shall cease to exist or to maintain an institution suitable for the care of the blind during the life of said William Gordon, then in trust to pay the income of said \$32,000 to any other society that will maintain and care for said William Gordon, and which he may select, and to pay the principal of said \$32,000 to such society as shall at the death of the said William Gordon be supporting and maintaining him."

At the date of the will the William Gordon therein mentioned was an inmate of the institution maintained at 219 West Fourteenth street in the city of New York by the defendant "the Society for the Relief of the Destitute Blind of the city of New York."

In October, 1877, William Gordon was expelled from the home of the said society for refusal to comply with some of its rules, and has never since been an inmate of the institution and refuses to become an inmate thereof. On the 25th of August, 1878, the said William Gordon, after he became acquainted with the contents of said will, selected the defendant, the St. Joseph's Home, as the society or institution to care for and maintain him, and he has ever since been and now is an inmate of the last-named institution, and is cared for and maintained

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by it without compensation. In May, 1879, the defendant, The Society for the Relief of the Destitute Blind, having learned of the provisions of Mr. McCrackan's will, informed the said Gordon that they were ready and willing to care for and maintain him at their institution, or elsewhere, during his life, in conformity with the requirements of said will; this he refused.

*John E. Develin* for appellants. The bequest is legal and valid and contains all the essentials to a valid trust. (*Williams v. Williams*, 4 Seld. 548-9; *Holmes, etc., v. Mead et al.*, 52 N. Y. 332; *McLoughlin v. McLoughlin*, 30 Barb. 458; *Powers, Ex'x, v. Cassidy, Ex'r, etc., et al.*, 79 N. Y. 602; Laws of 1848, chap. 319, § 6.) Trusts of personal property may be created in favor of persons specified or to be selected and specified in the future. (*Bucklin v. Bucklin*, 1 Keyes, 141; *Holmes v. Mead*, 52 N. Y. 348; Perry on Trusts, § 378; 1 R. S. 773, § 1 [1 R. S., Edm. ed., 727].) The St. Joseph's Home is entitled to the income of the fund from the 23d day of August, 1878, the date when the beneficiary, William Gordon, selected it, and it took upon itself to maintain and care for him. (Laws of 1848, chap. 319, § 6; *Powers, Ex'x, v. Cassidy, Ex'r, supra*; Perry on Trusts, § 378; *Christie v. Phylfe*, 19 N. Y. 398; 1 Redf. on Wills, chap. 9, § 30 c, sub-div. 14, 15, pp. 430, 431, 432; *Norris v. Beys*, 13 N. Y. 273; *Taggart et al. v. Murray et al.*, 53 id. 233; *Stewart v. Chambers*, 2 Sandf. Ch. 382; 1 Jarman on Wills, chap. 7, p. 427; *Doe ex dem. v. Turner*, 2 Dowl. & R. 398.) The St. Joseph's Home is also entitled to the income from the death of the testator, or from the date of investing the fund to the 25th of August, 1878. (1 R. S. 726; *Kilpatrick v. Johnson*, 15 N. Y. 326; *Gilman v. Reddington*, 24 id. 19; *Manice v. Manice*, 43 id. 303, 385.) In the construction of the will, the intention of the testator must be the chief point of consideration, and the surrounding circumstances must be considered in arriving at that intention. (4 Kent's Com. 535; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Button v. Am. Tract Soc.*, 23 Vt. 366; *Lasher v. Lasher*, 18 Barb. 106; *Post v.*

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*Hoover*, 30 Barb. 312; *Ram on Exposition of Wills*.) The words "so long as" in the clause of the will were words of limitation, and the contingent event must be in existence at the death of the testator to prevent an interim or hiatus in the ownership of the fund, and if not existent on the testator's death, the legacy remained in the trustees charged with the support of Gordon, unless Gordon exercised the right of selection given him in the will. (*Choper v. Remsen*, 3 Johns. Ch. 382; 5 id. 459; 6 Abb. N. C. 398.) The bequest was to the trustees to hold until the right of any society to the money is fixed by the death of Gordon; hence as the estate is in the trustees, meanwhile the bequest is not held in suspension or rendered void by the donee being undetermined in the interim. (*Gilman v. Reddington*, 24 N. Y. 15; *Williams v. Williams*, 8 id. 525; *Owens et al. v. The Missionary Society*, 14 id. 380; *Beekman v. Benson*, 23 id. 298; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *Shottwell v. Mott*, 2 Sandf. Ch. 46; *Wright v. Meth. Ep. Ch.*, 1 Hoffm. 202; 8 N. Y. 525; *Powers, Ex'r, v. Cassidy, Ex'r, et al.*, 79 N. Y. 602.)

*Robert A. Livingston and Sidney S. Harris* for respondents. The absence of Gordon from defendant's house, such absence arising from a violation of its rules previous to the testator's death, does not impair defendant's right to the legacy. (*Hogboom v. Hall*, 24 Wend. 146; *Eliot v. Eliot*, 10 Allen, 357; *Jackson v. Wright*, 3 Wend. 109.) If the maintenance of Gordon is a condition to defendant's right to receive the legacy and its income, the neglect of defendant to maintain him must be willful, that is, a failure to do what is reasonably required of defendant, and as the defendant has done all in its power to comply with the will consistent with a proper management of its institution, it is entitled to the income of the legacy. (*In re Cunningham's Will*, 6 Jur. [N. S.] 902; *Turner v. Tibbett*, 2 Younge & Collyer's C. C. 225; 1 Roper on Legacies, 767.) Defendant had a reasonable time after the testator's death to accept the legacy, and by accepting it the defendant has become bound to support Gordon. (*Gridley v. Gridley*, 24 N. Y.

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130 ; 2 Redfield on Wills, 301 [3d ed.] ; *Smith v. Jewett*, 40 N. H. 530.) If upon a true construction of the will the maintenance of Gordon at the home of defendant is a condition, it is a condition subsequent, and the legacy vested. (*Martin v. Ballou*, 13 Barb. 135 ; *Dommitt v. Bedford*, 6 T. R. 684 ; *Finley v. King*, 3 Pet. 346, 374.)

MILLER, J. There can, we think, be no doubt as to the validity and legality of the bequest made by the testator which is the subject of this controversy, and the only question presented is as to the construction to be placed upon the language employed and the terms and conditions upon which the bequest was made.

By the will of the testator he gave to his executors the sum of \$32,000, in trust, to invest the same and pay over the interest to the New York Home of the Blind, so long as that institution should maintain and care for William Gordon, who is stated to be an inmate of the same ; and in case he shall be cared for during the balance of his natural life, then the principal sum was to be paid to the institution. In case the society ceased to exist or to maintain an institution suitable for the care of the blind during the life of Gordon, then the income was to be paid to any other society that would maintain and care for Gordon, which he might select, and the principal should be paid to such society as should at the death of Gordon be supporting and maintaining him.

Although Gordon was an inmate of the institution at the time of the making of the will, he had left at the time of the testator's death. The will speaks from the latter date, according to a well-settled rule of law, and it must be construed having in view the purpose designed to be accomplished. The intention of the testator evidently was to accomplish two objects : first, the support of Gordon ; and second, to make a bequest to the institution for the benevolent purposes for which it was organized and carried on. These were co-ordinate and of equal consequence in his mind, and both are to be attained if practicable. The statement in the will that Gordon was

"an inmate of the institution" alone is of no importance if the testator's intention can otherwise be carried into effect. The words employed were merely intended as a designation of the beneficiary and were not a condition of the bequest. If Gordon had left without cause, prior to the testator's death, certainly it could not affect the right of the society to the legacy if it was willing to conform to the conditions imposed by the testator. The whim and caprice of Gordon could not control the right to the legacy; and, unless there was a refusal to support him, and to comply with the requirements of the testator after the bequest was known to the society, the right to the same remains unaffected. The legacy is not bequeathed to Gordon solely, and he has only an interest in it to the extent of a support for life, which consists in the performance by the society of the obligations required by the testator's will. His right, then, is not in any sense to the legacy, but his claim is upon the society; or if it fails to conform to the requirements of the will, upon such other society as may be substituted in its place. The society is entitled to the income, and in conformity with the will must maintain Gordon, not from the income derived from the legacy, but out of such funds as it may have from all sources of revenue.

These remarks bring us to a consideration of the question whether the society has failed substantially to comply with the terms imposed by the testator, or done any act which forfeits its right to the legacy. Upon learning of the provisions of the will through the medium of its proper officer, Gordon was notified in writing that the society was ready and willing to care for and maintain him at its institution or elsewhere during his life, in conformity with the will of the testator. We think the expulsion of Gordon prior to the death of the testator has nothing to do with the right of the society after his death, and the real question is whether it was since then and at the present time it is ready and willing to accept the legacy. We do not deem it necessary, therefore, to inquire whether the expulsion of Gordon was or was not without sufficient cause, and it is enough to say that when the society ceases to

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support Gordon and to carry out the benevolent object of the testator in this respect, it will be time to consider whether it has forfeited all right to claim the benefits of the legacy in question. And until this period arrives, it must be held that its right to receive the interest is clear and beyond any question.

It evidently intended, by the notice given to Gordon, to obviate objections of all kinds, for it virtually agrees to support him at any place which may be reasonably designated. The terms of the bequest do not require absolutely and unequivocally that the institution shall maintain and support Gordon within its own precincts; but if for any sufficient reason he cannot conform to the rules and regulations, he may, within the terms of the notice given to him, select some other institution or place at its expense and thus be cared for and supported. Gordon has a right to return and become an inmate of the institution; and while he is bound to observe all reasonable rules of the "Home," if for any just cause this cannot be done, he may be maintained at its expense in some other similar institution. If he chooses to refuse to accept the offer to maintain him, and to be absent without cause, it does not take away the right to the legacy. (*Hogeboom v. Hall*, 24 Wend. 146; *Jackson v. Wight*, 3 id. 109.) The maintenance of Gordon is a condition appended to defendant's right to receive the legacy and the income, and if the society fail to perform what is reasonably demanded in this respect, and willfully or unjustly refuse to render the support required, or impose any unjust, onerous or improper conditions or restrictions, such conduct would necessarily forfeit its right to the legacy. There must be a reasonable, fair and substantial performance of the condition; and when this is done it is sufficient. (*Tanner v. Tebbutt*, 2 Y. & Col. 225; *Roper on Legacies*, 767.)

It may also be remarked that by the acceptance of the legacy by the society it became lawfully bound to support Gordon (*Gridley v. Gridley*, 24 N. Y. 130; 2 Redf. on Wills [2d ed.], 304); and this without regard to the condition whether the



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income is sufficient for that purpose (*Smith v. Jewett*, 40 N. H. 530); and however burdensome. (2 Redf. on Wills, 304.)

The support of Gordon at the "Home" of the defendant is a condition to be performed after the acceptance of the bequest; and while a beneficial interest is given in the legacy, it is required that Gordon should be maintained. His maintenance is a condition subsequent; and when it becomes impossible to perform such a condition, the estate will not be defeated or forfeited. (*Martin v. Ballou*, 13 Barb. 135; *Dommett v. Bedford*, 6 Term R. 684; *Finlay v. King's Lessee*, 3 Pet. 346, 374.) In such cases the estate continues the same as if no condition was attached. If Gordon refuses to return and live at defendant's institution or to be provided for according to the offer made to him, thus rendering it practically impossible for the society to bestow upon him the benefits intended by the legacy, it cannot affect its right to the same. The reasonable and true construction of the condition of his support is, that the testator only intended that he should be maintained there if he so desired, and that he was not absolutely bound to live there. In the latter case, however, it was not designed that his refusal, which renders a strict performance impossible, should deprive the society of the legacy.

These views lead to the conclusion that the devise to the defendant was valid in law and that it has not been forfeited, and it remained vested in the defendant until an absolute failure to support Gordon as required, in case he was willing to be supported, or until the society shall cease to have a lawful existence or to maintain an institution suitable for the care of the blind during the life of Gordon.

A further result also follows, which is that the defendant, St. Joseph's Home for the Aged, has no interest in or right to the legacy in question. Nor has Gordon any right of selection under the circumstances existing, or any claim upon the legacy otherwise than herein stated. The time has not arrived when he is entitled to exercise any such right, and his choice is of no avail. Nor is it essential, in the present aspect of affairs, that any provision should be made in anticipation of

the society for any reason ceasing to support Gordon during his life, as in such a contingency ample relief could be obtained as already indicated.

We have given due consideration to the various points and suggestions made by the several counsel, and we discover no occasion to change the judgment of the Special Term, except that portion of it which makes a final disposition of the principal of the fund, and directs that in case the Society for the Relief of the Destitute Blind shall during the life of William Gordon be not supporting and maintaining, or be unwilling to maintain and support him at its own institution or elsewhere at any time during his natural life, the executors shall pay the balance to the residuary devisee. No facts appear which require any such provision to be made, and it will be sufficient to make such a disposition of the fund when rendered necessary by the happening of the contingency which requires it, and until then it is not authorized. In this respect the decree should be modified; and otherwise it must be affirmed, and neither party should have costs as against the other upon this appeal.

FOLGER, Ch. J. I concur in this result and in the opinion, but wish to add some words.

The opinion says that Gordon is "bound to observe all reasonable rules and regulations of the home." As a general proposition, this is true. But what may be reasonable rules and regulations of the home for its patients in general may not be reasonable for one taken within its walls in the circumstances and under the conditions wherein Gordon is to be received. For instance, no one in this community can reasonably object that the home should have religious observances, under rules and regulations applicable to all patients, or patients who come into it as a favor sought by them. But in such a case as that of Gordon, who is more like a patient who confers a favor by going into it, and who need not be taken or go unless it is with the will and wish of the home, I think that there should be a scrupulous regard for the compunctions or even whims of

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his religious feeling; that his desires or his repugnances in that respect, be they convictions of faith, or prejudices of sect, or blind followings of early training, should be yielded to and accommodated; and that he should not be required by general rules or otherwise to attend religious services that are not agreeable to him.

All concur with MILLER, J., except RAPALLO, J., dissenting, and ANDREWS, J., concurring in result.

Judgment affirmed as modified in accordance with opinion of MILLER, J.

EMMA S. FALKLAND, as Administratrix, etc., Appellant, v. THE  
ST. NICHOLAS NATIONAL BANK OF NEW YORK.

The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted to plaintiff. In an action to recover the amount so retained, *held*, that defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the benefit of those for whom the moneys were received.

Also, *held*, that it was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiff.

Also, *held*, that it was immaterial that defendant was not notified that said intestate so held the funds in trust; that the deposits being in his name he was under no obligation to give notice that others had an interest therein.

Also, *held*, that the discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against them, did not deprive those for whom the funds were deposited of their right thereto. *Falkland v. St. Nicholas Nat. Bank* (21 Hun, 450), reversed.

(Argued January 23, 1881; decided February 11, 1881.)

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APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 11, 1880, affirming a judgment in favor of defendant, entered upon a decision of the court on trial without a jury and affirming an order denying a motion for a new trial. (Reported below, 21 Hun, 450.)

This action was brought to recover a balance alleged to be unpaid on account for moneys deposited by George F. Falkland, plaintiff's intestate.

The facts found by the referee are substantially as follows :

The firm of Ruger Bros. were for several years prior to the 13th of July, 1866, shipping merchants or brokers, doing business in the city of New York as ship brokers or agents ; the business of the firm consisted in chartering vessels, collecting freight moneys on vessels consigned to them, and acting as agents for a line of steamships ; the moneys received by them in the business of their agency they formerly deposited in their bank account ; but about the time named the firm became embarrassed in business, and in consequence thereof, and in order to keep the funds received and to be received by them in the course of their said business from being attached by their creditors, and for the benefit of those entitled thereto, they on said 13th of July, 1866, caused an account to be opened by plaintiff's intestate who was their book-keeper in defendant's bank, and thereupon and until the 20th of August following, the moneys and checks received in the course of the business were deposited in said account to the credit of Falkland. At this time, and until July 26th, Ruger Bros. continued to deposit their own money in their own account with the Corn Exchange Bank. In receiving, depositing and paying out said moneys, Falkland acted solely under the directions and instructions of Ruger Brothers for whom he continued to be book-keeper, and their business continued to be transacted in all respects in the same manner as before such account was opened, except that said moneys were so deposited in the name of Falkland. Prior to the 23d day of July, 1866, the defendant received in the regular course of their business, and discounted a note made by

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said Ruger Brothers for the sum of \$1,793, which said note matured and became payable on that day, on which day defendant charged it to the account of Falkland, who had no connection therewith, nor was the note payable at defendant's bank.

On August 16, 1866, there was on deposit with defendant to plaintiff's credit the sum of \$2,000. Falkland on that day presented to defendant a check for \$2,000, to draw the remainder of said deposits; defendant declined to honor said check, but offered to pay plaintiff the difference between the said balance of \$2,000, and the amount of said note for \$1,793, which plaintiff declined to receive. In the summer of 1866 Ruger Bros. became bankrupt, and on the 30th day of April, 1869, received their discharge in bankruptcy; the schedules of creditors in the proceedings in bankruptcy embraced all of the creditors of said firm, including by name the defendant herein.

*Cecil Campbell Higgins* for appellant. A contract is the basis upon which is founded the whole relation between a bank and its depositor. (*Marine Bk. v. Fulton Bk.*, 2 Wall. 252; 5 id. 663; *Matter of Franklin Bk.*, 1 Paige, 249; *Com. Bk. of Albany v. Hughes*, 17 Wend. 94; *Marsh v. The Oneida Cent. Bk.*, 34 Barb. 298; *Downes v. Phoenix Bk.*, 6 Hill, 297; *Winter v. Bk. of N. Y.*, 2 Cai. 337; *Jordan v. Nat. Shoe and Leather Bk.*, 74 N. Y. 473.) If the relation between banker and depositor be that of debtor and creditor, and be founded upon a contract, then the terms of that contract must be carried out. (*Mason v. First Nat. Bk. of Lock Haven*, Phil. "Weekly Notes of Cases," Thursday, Dec. 16, 1880, vol. 9, No. 17, pp. 265-267; 22 Alb. L. J., No. 21, p. 412; *Tassel v. Cooper*, 67 Eng. Com. L. R., 9 Man., G. & S. 509, 533, 535; *Simms v. Brittain*, 4 B. & Ad. 375; *Watts v. Chrystie*, 11 Beav. 546; 18 Jur. 244, 845; 18 L. J. Ch. 173; *Lund v. Seamen's Sav. Bk.*, 37 Barb. 129; *S. C.*, 23 How. Pr. 258; *Trigg v. Hite*, 17 Abb. Pr. 436; *Swartwout v. Mechanics' Bk.*, 5 Den. 555; 56 N. Y. 544; *Mason v. The First Nat. Bk. of Lock Haven*, Alb. L. J., Nov. 20, 1880, p. 412; "Weekly Notes of Cases," Dec. 16, 1880, p. 265; *Van Alen*

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v. *Am. Exch. Bk.*, 52 N. Y. 1; *Jordan v. Nat. Shoe and Leather Bk.*, 74 id. 477; *Patterson v. Patterson*, 59 id. 574.) To entitle the defendant to a set-off, he must plead, or give notice of the same. (*Bates v. Rosekrans*, 37 N. Y. 409; *Clough v. Murray*, 9 Abb. Pr. 97; *Am. Dock and Improvement Co. v. Stanley*, 40 N. Y. Supr. 539; *Patterson v. Patterson*, 59 N. Y. 574, 579, 581; *Jordan v. Nat. Shoe and Leather Bk.*, 74 id. 467, 471-2.) The bank having accepted the deposit was bound to return it to the depositor on demand. (*Bk. of Lock Haven v. Mason*, *supra* [Penn.], Alb. L. J., Nov. 20, 1880, p. 412; *Saltus v. Everett*, 20 Wend. 268; *Com. Bk. of Albany v. Hughes*, 17 Wend. 94-100.) Rugar Brothers would have been guilty of fraud, and subject to arrest, if they had not protected these trust moneys by depositing them as they did, under advice of counsel, in the name of Falkland. (*Roebeling v. Duncan*, 8 Hun, 502; 67 N. Y. 598.) A complaint containing a statement of the facts, constituting a cause of action on contract, sustained by proof of such facts upon the trial, authorizes a recovery, although the complaint is in form for a conversion and the summons in the action is for relief. (*Conaughty v. Nichols*, 42 N. Y. 83; *Ledwich v. McKern*, 53 id. 376; *Austin v. Ranodon*, 44 id. 63; *Greentree v. Rosenstock*, 61 id. 588; *Graves v. Waite*, 59 id. 156; *Gordon v. Hostetter*, 37 id. 104; *Vilmar v. Schall*, 61 id. 564; *Needer v. Cooley*, 2 Hun, 74; *Beard v. Yates*, id. 466; *Ladd v. Arkell*, 37 N. Y. Supr. 35; *Knapp v. Roche*, id. 395; Code of Civil Proc. 519, 540, 722, 723; *Conaughty v. Nichols*, 42 N. Y. 83; *Graves v. Waite*, 59 id. 156.)

*George W. Parsons* for respondent. A bank has a general lien on all moneys and funds of a depositor in its possession for the balance of a general account. (*Morse on Banking*, 42, 45; *The Commercial Bank, etc. v. Hughes*, 17 Wend. 94; *Scott v. Franklin*, 15 East, 428; *Brandas v. Barnett*, 12 Clark & Finn. App. Cas. 787; *Curry v. Misa*, 10 Exch. 153; *Misa v. Currie*, 35 L. T. [N. S.] 414; 1 App. Cas. 554.) Independent of any lien, the defendant had a right to set off

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any matured claims it had against Ruger Brothers, to the demand of plaintiff in this action. (*Driggs v. Rockwell*, 11 Wend. 504, 508; *Waterman on Set-off*, § 197; *Caines v. Brisbane*, 13 Johns. 9; 2 R. S. 355; 3 id. 615 [6th ed.], sub. 10, to § 12; Code of Civil Procedure, § 502, sub. 3.) The moneys were the funds of Ruger Brothers, for the purposes of the set-off claimed in this action. (*Ferris v. Van Vechten*, 73 N. Y. 113, 121; *Levy v. Cavanagh*, 2 Bosw. 100; *Morse on Banking*, 45; *Misa v. Currie*, 35 L. T. [N. S.] 414; *Sheridan v. The Mayor, etc.*, 68 N. Y. 30; *Van Alen v. Am. Nat. Bk.*, 52 id. 1; *Bk. of Lock Haven v. Mason* [Penn. Supr. Ct., June Term, 1880], 22 Alb. L. J. 412.) The complaint does not possess the elements of a complaint on contract. (*Conaughty v. Nicholas*, 42 N. Y. 83, 87; *Sager v. Blain*, 44 id. 445; *Andrews v. Bond*, 16 Barb. 642; *Ross v. Mather*, 51 N. Y. 108; *Anderson v. Hill*, 53 Barb. 238, 246; *Quintard v. Newton*, 5 Robt. 72, 80; *Henderson v. Jackson*, 9 Abb. [N. S.] 293, 303.)

MILLER, J. The rule that a bank has a general lien upon all moneys or funds in its possession belonging to the depositor is a part of the law merchant and well-established in commercial transactions. It rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has therefore a right to retain such funds until payment is actually made.

The right to make an application of such funds also arises from the contract implied to exist from the relation of the parties and by operation of law. Mere possession, however, is not of itself sufficient to maintain the lien; but the debt to the bank must have matured, and then each may counter-claim, set-off or recoup the same as any other debtors. The relation is one which is mutual and can only exist where the demands are of the character indicated, and where each of the parties is a debtor to the other. (*Jordan v. Nat. Shoe & Leather Bank*, 74 N. Y. 472.) The rule stated does not interfere with the right

of third parties, whose moneys have become mingled with those belonging to the depositor, to assert and maintain a claim to the same while in possession of the bank, and by an action to recover the amount thus deposited. (*Van Alen v. The American National Bank*, 52 N. Y. 1.) It must be made clear that the moneys deposited actually belong to the person from whom the account is due to entitle the bank to apply them in payment of its demand. Conceding that the moneys are applicable, even although they are deposited by and in the name of another, the same as if in the name of the actual owner, the fact of ownership must be made to appear and it must be shown satisfactorily that such owner is the person indebted to the bank and really entitled to the funds deposited. The claim of the defendant in this case is based upon the theory that the money was received by the Ruger Brothers, as shipping merchants or brokers, and was really deposited for their benefit, and became liable for their debt, which had matured, to the bank.

The question then arises whether the moneys deposited were the funds of the firm for the purposes of the set-off claimed by the defendant. The testimony upon the trial established that the deposits made by the plaintiff's intestate were moneys received in the ordinary course of the business of Ruger Brothers as agents and ship-brokers, on account of vessels consigned to them for freights collected, as well as moneys paid to meet certain liabilities of a firm of shippers. These moneys did not belong to Ruger Brothers, nor to the plaintiff's intestate, but to the captains of vessels and to other parties, and only a very inconsiderable percentage would be coming to Ruger Brothers for commissions. They were deposited in the name of plaintiff's intestate, on account of the financial embarrassments of Ruger Brothers, for safe-keeping and in order that they might be paid over to the parties to whom they actually belonged. Upon this evidence the court upon the trial found that Ruger Brothers, in the course of their business, received various sums of money on account of captains of vessels, and on account of various freights of vessels, consigned to them,



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and deposited such moneys in their bank account. That they became embarrassed in business, and in consequence thereof and in order to keep the fund received by them from being attached by creditors, they caused an account to be opened by their book-keeper, the plaintiff's intestate in defendant's bank, and the moneys and checks received were deposited in said bank to the credit of the plaintiff's intestate. It thus appears that the moneys in question were not actually the property of Ruger Brothers, and they had no right or title to the same, and the defendant's demand was not the subject of set-off or recoupment against such moneys. They belonged to and were the property of the consignees and the persons for whom they had been collected and received, and were deposited solely for their benefit.

The dealings of Ruger Brothers were of a confidential character, and the moneys were received by them in trust and deposited on account of the *cestuis que trust*. Having knowledge of their own insolvency, Ruger Brothers were justified in protecting the funds of the parties, in whose behalf they were acting as agents, from being liable to be applied to the payment of their debts, and by depositing the moneys in the name of the plaintiff's intestate they did not deprive the creditors for whose benefit the deposit was made of their right to the same, or appropriate them to the payment of the demand which the bank held against that firm. The rule that when moneys held in trust have been mingled with other moneys of the trustees, so as to be undistinguishable, the *cestui que trust* cannot claim a specific lien upon the property or funds. *Ferris v. Van Vechten* (73 N. Y. 113), has no application when the money is held in trust to pay certain creditors, and cannot be invoked to uphold the defendant's claim to the funds in question in the case at bar, as these moneys have never lost their original character, and have never been mingled with the moneys of Ruger Brothers, but on the contrary were especially deposited and set apart in the name of a third person for a specific purpose, and therefore cannot be regarded in any respect as moneys of Ruger Brothers by whom they were originally received; nor

does it aid the defendant because it does not appear that any of the creditors of Ruger Brothers have made any claim for the same.

It is a sufficient answer to this objection to say that the creditors for whom they were set apart were entitled to the moneys, and have the right to enforce their claim to the same by instituting an action for that purpose, or by compelling the plaintiffs to pay over such sums as the intestate received and held in trust for their benefit. The right of such creditors is paramount and supreme over the claim of the defendant, as the moneys were expressly deposited for and were to be paid to them, according to their respective interests. It never belonged to Ruger Brothers, was not liable for their debts, and not having been mingled with their funds, cannot be claimed on any such ground. Nor is it an answer to the position that the plaintiff's intestate, in making the deposit, acted as the agent and trustee of the person for whom the money was received, that the defendant never dealt with the plaintiff's intestate as trustee, or had any notice or knowledge that he claimed to act in that capacity. The deposit being in the plaintiff's intestate's name alone, and not for Ruger Brothers, he was under no obligation and owed no duty which required that he should notify the defendant that he held the funds in trust, or that other parties besides himself had an interest in the deposits. It could not affect the defendant's rights in any sense, because it had no notice, as it had no claim whatever, and no reason for relying upon a fund deposited in the name of another for the payment of its debt against Ruger Brothers. In fact, from the deposit itself the defendant had notice that the funds belonged to the depositors and not to Ruger Brothers, and without proof that they actually belonged to Ruger Brothers, it had no right to appropriate or to claim these moneys for the payment of its demand.

It is urged that the claims of the creditors were cut off by the discharge of Ruger Brothers in bankruptcy. If Ruger Brothers set apart these moneys for the benefit of those for whom they were received, they created an express trust in

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their behalf; and as the money belonged to them, a discharge in bankruptcy, while it might destroy their claim against Ruger Brothers, would not deprive them of the right to the fund which had been reserved and deposited in the name of the plaintiff's intestate on their behalf. In no contingency did the fund belong to Ruger Brothers, and the defendant had no right or title to it whatever, nor any claim to set off its demand against it. Upon no other ground can the claim of the defendant be upheld, and after a careful examination, we are brought to the conclusion that the judge erred upon the trial in allowing the same.

No exception was taken to the ruling of the judge upon the motion to dismiss the complaint, and as the defendant does not appeal it is not in a position to raise any question in regard to the decisions made against it. Some other points are urged by the appellant's counsel, but the conclusion already reached renders their consideration unimportant.

For the error stated, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

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THE DIRECT UNITED STATES CABLE COMPANY (Limited), Appellant, v. THE DOMINION TELEGRAPH COMPANY et al., Respondents.

Two corporations organized under the laws of Great Britain entered into an agreement, which provided, in case of difference, for arbitrators to be appointed and to act in this State, having the powers given to arbitrators under the English common-law procedure, their award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other and arbitrators appointed under the agreement, to restrain the prosecution of the arbitration, the Special Term denied plaintiff's motion for a preliminary injunction on the ground as stated in the order "that the court has no jurisdiction in this action." *Held*, error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the State.

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The order of Special Term was "in all respects affirmed" by the General Term. *Held*, that this court could only look to the order to ascertain the ground upon which the court below proceeded.

(Argued February 8, 1881; decided February 11, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term, which dissolved a preliminary injunction herein and refused an application to continue the same on the ground as stated in the order "that the court has no jurisdiction in this action." (Reported below, 22 Hun, 568.)

The plaintiff and the defendant, the Dominion Telegraph Company, are corporations organized under the laws of Great Britain. The other defendants are citizens of this State. Said corporations entered into a contract which provided that in case of differences arising between them, each party should appoint an arbitrator in New York, the two so appointed being authorized to appoint an umpire; if either party refused or neglected to appoint an arbitrator for ten days after request, or appointed one who should neglect or refuse to act, then the arbitrator chosen by the party making the request should appoint the other. It was declared in the agreement that the arbitrator so appointed should have all the powers given to arbitrators by the Common-Law Procedure Act of 1854, that the proceedings of the arbitrators should be governed thereby and that their award should be made a rule of the Queen's Bench. The complaint alleged that arbitrators were appointed by the parties to the agreement as prescribed therein, but that by the direction of defendant, the Dominion Telegraph Company, defendant Sampson, the arbitrator, selected by it upon the pretense that the arbitrator appointed by plaintiff had declined to act within the time prescribed for the appointment of an umpire, had appointed defendant Buckley as arbitrator in place of the one appointed by plaintiff; that said individual defendants had given notice to plaintiff that they had appointed an umpire and proposed to proceed with the arbitration.

This action was brought to restrain the defendants from prosecuting such arbitration.

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*Lewis L. Delafield* for appellant. Courts of equity have power to restrain proceedings pending in the courts of a foreign country, when the parties are within their jurisdiction. (*Dehon v. Foster*, 4 Allen, 545, 550; 7 id. 57; *The Carron Iron Co. v. Maclaren*, 35 Eng. L. & Eq. 37, 49; *Bunbury v. Bunbury*, 1 Beav. 318; *Mackintosh v. Ogilvie*, 3 Swanst. 365; *Bushley v. Munday*, 5 Maddock, 297; *Beckford v. Kemble*, 1 Sim. & Stu. 7, 15; *Bank of Bellows Falls v. Rutland R. R.*, 28 Vt. 470; *Weddeburn v. Weddeburn*, 2 Beav. 208; High on Injunctions, 38-41; Hilliard on Injunctions, 49, 284-290, 394; 2 Story's Eq. Jur., §§ 899, 900; Kerr on Injunctions, 154-160; *Barry v. Brune*, 8 Hun, 395, 404; *Fisk v. Chicago, etc., R. R.*, 53 Barb. 513; *Field v. Holbrook*, 3 Abb. Pr. 377; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462, 470; *Dehon v. Foster*, 4 Allen, 550; *Carron Iron Co. v. Maclaren*, 35 Eng. L. & Eq. 51; *Vail v. Knapp*, 49 Barb. 300; *Roper v. London*, 5 Jurist [N. S.], 491.) When a matter can be more conveniently tried, or the ends of justice will be better attained in the forum where the action is brought, the proceedings in the courts of the foreign country will be enjoined. (*The Carron Iron Co. v. Maclaren*, 35 Eng. L. & Eq. 50; *Beckford v. Kemble*, 1 Sim. & Stu. 15; 2 Joyce on Injunctions, 1013.) An agreement to refer all matters of difference that may arise to arbitration will not oust a court of law or equity of jurisdiction. (*Hurst v. Litchfield*, 39 N. Y. 377, 379; *President, etc., D. & H. Canal Co. v. Penn. Coal Co.*, 50 id. 251, 258; *Lee v. Page*, 7 Jurist [N. S.], 768; *Horton v. Sayer*, 5 id. 989; *Scott v. Avery*, 5 H. of L. Cas. 811; *Elliott v. Royal Exchange Assurance Co.*, L. R., 2 Exch. 237, 242; *Scott v. Liverpool*, 27 L. J. 641, Equity.) Courts of equity may restrain the proceedings of arbitrators and actions upon awards in cases where the arbitrators have misconducted themselves. (*Malmesbury R. R. v. Budd*, L. R., 2 Ch. Div. 113; *Bedden v. Bedden*, L. R., 9 id. 766; *Van Cortlandt v. Vanderbilt*, 7 Johns. 405; *Cleland v. Hedley*, 5 R. I. 163; *Walker v. Frobisher*, 6 Ves. 70; Hilliard on Injunctions, 221; *Sisk v.*

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*Garey*, 27 Md. 401.) This was a proper case to enjoin the defendants. (Common-Law Procedure Act, 1854; *Baker v. Stephens*, L. R., 2 Q. B. 523, 527; Common-Law Procedure, § 14, act 1854; Law Journal, 1854-56, p. 297, ch. 125; 17 & 18 Victoria.) The order of the General Term, being founded upon an erroneous conception of its power, is reviewable in this court. (*Tilton v. Beecher*, 59 N. Y. 176; *Equitable L., etc., v. Stevens*, 63 id. 341; *People v. N. Y. Cent. R. R.*, 29 id. 418; *Brown v. Brown*, 58 id. 609; *Hewlett v. Wood*, 67 id. 394, 399; *Sheldon v. Sheldon*, 51 id. 354; *Thornton v. Autenrich*, 55 id. 659; *Downing v. Kelly*, 48 id. 433; *Snebley v. Conner*, 78 id. 218; *Gibson v. Chouteau*, 8 Wall. 314; *Rector v. Ashley*, 6 id. 143; *Noyes v. Children's Aid Society*, 70 N. Y. 485; *Campbell v. Seaman*, 63 id. 568, 582.)

*William Dorsheimer* for respondents. Even if the court could entertain the suit at all, it rightfully refused a preliminary injunction, because such an injunction would be unnecessary. (7 Abb. [N. S.] 251.)

PER CURIAM. The Supreme Court had jurisdiction to hear and determine the application in this case. The plaintiff, although a foreign corporation, can invoke the jurisdiction of our courts. The individual defendants are residents of this State. Whether a case is presented upon which the court should grant an injunction is one to be determined by the court to which the application was made, after entertaining jurisdiction of the proceeding. The order of the Special Term denied the motion on the ground "that the court has no jurisdiction in this action," and this order was "in all respects affirmed" by the General Term. This court can only look to the order to ascertain the ground on which the court below proceeded. (*Hewlett v. Wood*, 67 N. Y. 394.) We think the orders of the Special and General Terms should be reversed, and the case remitted to the Special Term to hear the application upon the merits, without costs to either party in this court.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

DERICK L. BOARDMAN et al., Executors, etc., Respondents, v.  
THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COM-  
PANY, Appellant.

Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to any thing.

A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared.

When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets including all undeclared dividends.

While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and when necessary, to restrain, by injunction, any action adverse to such right.

A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein.

In 1857 the M. S. & N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also to share *pro rata* with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. Said company was consolidated with defendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock. In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. S. & N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction.

The resolution of the directors declared that dividends on the stock author-

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ized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock.

There was no proof of plaintiffs' title to the preferred stock except the certificate issued to plaintiffs' testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that plaintiffs' stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners.

Plaintiffs' testator did not become owner of the stock until 1863. *Held*, that the transfer to him carried with it all right to the unpaid dividends.

*Hill v. The N. Co.* (8 Hun, 459; affirmed, 71 N. Y. 598), distinguished.

The complaint asked and the judgment directed a specific performance of the contract and restrained defendant from paying dividends upon that portion of its common stock which represented the common stock of the M. S. & N. I. R. R. Co. until the amount of the arrears was paid. *Held*, no error; that plaintiff was entitled to the equitable relief granted.

*Coe v. B. & C. D. R. R. Co.* (2 Irish R. [C. L. S.] 112), distinguished.

Also, *held*, that an action was maintainable against defendant alone as the representative of the corporation with which the contract was made.

Also, *held*, that, as the claim was originally against a foreign corporation and as the articles of consolidation by which defendant assumed the obligation took effect within six years of the commencement of the action, the statute of limitations did not run against plaintiffs' claim; also that as it did not appear that any action on the part of defendant was induced by the delay in prosecuting said claim, plaintiff was not estopped by such delay.

*Kent v. Q. M. Co.* (78 N. Y. 184), *Coles v. Bank of England* (10 Ad. & El. 437), *Pickard v. Sears* (6 id. 474), *Prendergast v. Turton* (1 Younge & Coll. 98), *Stafford v. Strofford* (1 De Gex & J. 193), *Nichols v. Gilson* (3 Atk. 573), *Currie v. Gould* (2 Mad. Ch. 426), *Matthews v. G. N. R. R. Co.* (5 Jurist [N. S.], Part 1, 284, 290) distinguished.

Defendant was organized as a corporation under the statutes of several States to operate a continuous line of road running through those States which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the U. S. Constitution (art. 1, § 8, sub. 3), conferring on Congress the power to regulate commerce with foreign nations and among the several States. *Held*, unobjectionable; that in the absence of any legislation by Congress upon the subject, the power so to legislate existed in the States.

Also, *held*, that plaintiff was entitled to recover interest.



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The rule laid down by the English authorities where interest upon annuities was refused, *held* not to apply.

(Argued November 12, 1880; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 4, 1879, affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

This action was brought by George S. Boardman, plaintiffs' testator, in August, 1875, to compel defendant to pay dividends upon certain shares of preferred stock held by him and to restrain it from paying dividends upon certain portions of its common stock until the claim of plaintiff was paid and satisfied. The original plaintiff having died after trial and before the decision the present plaintiffs were substituted.

The facts found by the court are substantially as follows:

From and during the year 1857, until in or about the year 1869, the Michigan Southern and Northern Indiana Railroad Company was a corporation created and existing under the laws of the respective States of Michigan, Ohio, Indiana and Illinois, and was the owner of and engaged in operating railroads lying in the said States. About the month of April, 1857, the said corporation having become indebted to a large amount, a plan was devised to raise funds by the issue of preferred stock. The plan was submitted for approval to the stockholders of the said corporation at their regular annual meeting in April, 1857, and thereupon the same was approved by a vote or resolution adopted unanimously. On or about the 5th day of May, 1857, the then board of directors of the said company duly voted to issue the said preferred stock, and for that purpose unanimously adopted a resolution as follows:

"*Resolved*, That for the purpose of providing means for the payment of the unfunded debts of this company and for the completion of its unfinished works, there be and there is hereby created a guaranteed and preferred stock of this company, to be denominated 'construction stock,' to the amount of \$3,000,000, which stock shall be entitled to dividends at

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the rate of ten per cent per annum, payable in cash semi-annually in New York, and in the payment of such dividends the said guaranteed stock shall have preference and priority over the remaining stock of the company, and dividends at the rate aforesaid shall always be paid upon said guaranteed stock out of any net earnings of the company before any portion of said net earnings shall be applied to the payment of dividends upon the remaining stock of the company; and in case the earnings of the road shall enable the company hereafter to pay dividends upon all of its stock at a rate exceeding ten per cent per annum, then such guaranteed stock shall be entitled to share, *pro rata* with the other stock, in such excess over ten per cent per annum. The first dividend on said stock will be payable the 1st day of December next, and thereafter on the 1st of June and 1st December in each year."

Notice was given to the public and to stockholders, and books of subscription were opened and the amount of stock offered was subscribed for and taken. The book of minutes containing those resolutions was received in evidence under objection and exception.

No dividend whatever was declared or paid by the company upon the said guaranteed or construction stock from the date of the issue thereof until on or about the 1st day of July, 1863, at or about which time the then directors of the said corporation declared and announced a dividend of five per cent on so much of said stock as was then outstanding, payable on the 1st day of August, 1863, for the six months prior to that date.

After that date, and down to the time of the consolidation hereinafter mentioned, the said company regularly earned, declared and paid the said percentage or dividend of five per cent for each successive period of six months upon said stock.

The company realized and accumulated surplus earnings over and above the dividends so paid, and its board of directors declared and announced a dividend of three and one-half per cent upon its common stock, payable August 1, 1864, which was paid, and also declared and paid a second dividend of like amount, payable March 1, 1865; said two dividends

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amounting to a sum sufficient, if applied for that purpose, to cancel and pay off the whole arrears of dividends upon the guaranteed or construction stock which was outstanding at the time of the commencement of this action. After the said 1st day of March, 1865, other dividends were declared and paid by the said company upon the common stock.

On November 26, 1862, twenty-three shares of said preferred stock were assigned to plaintiffs' testator, and a certificate of the said shares was contemporaneously with such sale delivered to him; such certificate being in the form adopted by the said board of directors, and which was printed in blank to be filled up in writing. The form of the certificate is as follows:

*"Michigan Southern and Northern Indiana Railroad Company.*

"Guaranteed ten per cent stock.

"This is to certify that.....entitled to.....shares of \$100 each in the capital stock of the Michigan Southern and Northern Indiana Railroad Company, denominated construction stock; said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York on the 1st days of June and December in each year, out of the net earnings of the said company; and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed. The said stock is transferable only on the books of the said company at their office in the city of New York by the said stockholder in person, or by....., attorney, on the surrender of this certificate.

"In witness whereof the said company have caused the same to be registered, and this certificate to be signed by their president and treasurer and countersigned by their secretary."

In or about the year 1869, pursuant to the provisions of certain acts of the legislatures of the States of Pennsylvania, Ohio,

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Michigan, Indiana and Illinois, the Michigan Southern and Northern Indiana Railroad Company was merged and consolidated with the Lake Shore Railway Company, which owned and operated a railroad extending from the city of Erie, in the said State of Pennsylvania, to the city of Toledo, in the said State of Ohio, and the consolidated company so formed took and assumed the name of the Lake Shore and Michigan Southern Railway Company. Afterward, and pursuant to the provisions of the act of the legislature of the State of New York, entitled "An act authorizing the consolidation of certain railroad companies," passed May 20, 1869, and also pursuant to the provisions of certain laws of the said States of Pennsylvania, Ohio, Michigan, Indiana and Illinois, the Buffalo and Erie Railroad Company, a corporation created and existing under and by virtue of the laws of the States of New York and Pennsylvania, and which owned and operated a railroad extending from Buffalo to the eastern terminus of the line of railway of the Lake Shore and Michigan Southern Railway Company, was merged and consolidated with the Lake Shore and Michigan Southern Railway Company. At the time of such consolidation the Buffalo and Erie Railroad Company and the Lake Shore and Michigan Southern Railway Company owned and operated lines of railroad, which, taken together, formed a continuous line of railroad extending from the city of Buffalo to Chicago, in the said State of Illinois. The said company so formed by last-mentioned merger and consolidation assumed the name of and became and is known as the Lake Shore and Michigan Southern Railway Company, which is the defendant in this action; the agreement for the merger and consolidation last mentioned was filed and recorded in the office of the secretary of State of the State of New York on the 14th day of August, 1869.

By the provisions of the several statutes authorizing the consolidation, the rights of all the creditors of, and all the liens upon the property of the Michigan Southern and Northern Indiana Railroad Company were to be and were preserved unimpaired; by the said agreement of consolidation all just debts, guarantees,

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liabilities and obligations existing against either of the said companies, parties to said agreement at the time of the taking effect of said consolidation, were assumed by the said consolidated company; and all contracts and agreements existing between either of the said parties to the said agreement of consolidation and other companies, or with any person or persons, were to be carried out and performed by the said consolidated company.

At the request of defendant's counsel the referee found the following additional facts: That plaintiff has received dividends semi-annually on said stock from and including August 1, 1863, until the trial of this cause; that the said Michigan Southern and Northern Indiana Railroad Company had at all times, between April 1, 1857, and June, 1869 (the time when it consolidated with the Lake Shore Railway Company), an office and place of business in the city of New York, in the State of New York, and that during such period its president, treasurer, and a majority of its directors, resided in the State of New York; that it had and owned property in the State of New York at all times between April 1, 1857, and the time it consolidated as aforesaid; that the defendant had at all times since August, 1869, an office and place of business and property in the city of New York, in the State of New York, and that during such period its president, treasurer, and a majority of its directors resided within the State of New York; that the certificate of shares of stock, given in evidence by the said plaintiff, is the only proof of his ownership of or title to the stock upon which he seeks to recover dividends in this action; that no dividends were declared by the Michigan Southern and Northern Indiana Railroad Company at any time prior to the dividend made payable August 1, 1863, on the stock in question; that the said company never at any time recognized any claim for back dividends on the stock in question as a debt or valid liability or obligation against it; that the said company did not at any time after May, 1857, and prior to August 1, 1863 (the time when it paid its first dividend on this stock), realize or earn any moneys which should or ought to have been applied to the pay-

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ment of dividends on the plaintiffs' or on any of the guaranteed or construction stock which was authorized to be issued by the said company as aforesaid.

Further facts appear in the opinion.

*James Matthews and Edward S. Rapallo* for appellant. The contract between the purchaser of the stock and the company is that contract contained in the wording of the certificate. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 180; *McCluskey v. Cromwell*, 11 id. 593, 601; *Wilson v. Dean*, 74 id. 531; *Henry v. The Great Northern Ry. Co.*, 3 Jur. [N. S.] part 1, 1137; *Taft v. The H. P. & F. R. R. Co.*, 8 R. I. 310; *Stevens v. The South Devon R. R. Co.*, 12 Eng. L. & Eq. 229; *Crawford v. The North-eastern Ry. Co.*, 3 Jur., part 1, 1093; *Sturges v. The East U. R. R.*, 31 Eng. L. & Eq. 406; *Miller v. Ill. Cent. R. R. Co.*, 24 Barb. 329; *Miller v. Travers*, 8 Bing. 244; *Sanderson v. Piper*, 5 Bing. N. C. 425; *Reed v. Prop. of Locks, etc.*, 8 How. [U. S.] 274; *Sargent v. Adams*, 3 Gray [Mass.], 72.) The court erred in finding as a fact that the shares of stock, upon which the plaintiffs sue, are a portion of the \$3,000,000 issue of 1857, upon which the non-payment of dividends has been proved, there being no evidence of the identity of the plaintiffs' stock with a part of the issue. (*Putnam v. Hubbell*, 42 N. Y. 106-112.) The court erred in giving plaintiffs judgment for the amount of dividends unpaid during the whole period from 1857 to 1863, in view of the fact that plaintiffs' testator did not become owner of the stock until 1862. (*Hyatt v. Allen*, 56 N. Y. 553; *LeRoy v. The Globe Ins. Co.*, 2 Edw. Ch. 656; *Hill v. Newechawanick Co.*, 8 Hun, 459; 71 N. Y. 598; *Jones v. Terre Haute*, 29 Barb. 353, and 57 N. Y. 196; *Van Wicklen v. Paulson*, 14 Barb. 654.) A court of equity possesses no general visitorial powers over corporations, except such as are expressly conferred by statute. (*Latimer v. Eddy*, 46 Barb. 61; *Karnes v. Roch., etc., R. R.*, 4 Abb. [N. S.] 107; *Bangs v. McIntosh*, 23 Barb. 599; *Howe v. Deannel*, 43 id. 505; *Belmont v. Erie Ry. Co.*, 52 id. 666-8; *Atty.-Gen. v. Bk. of Niagara*, Hopk. Ch. [2d ed.]

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412; *State of La. v. Bk. of La.*, 6 La. 745; *Brown v. Monmouthshire Ry. Co.*, 4 Eng. L. & Eq. 118; *Jackson v. Newark R. R. Co.*, 2 Vroom [3 N. J.], 277; *Rex v. Bk. of Eng.*, 2 Barn. & Ald. 620; *Karnes v. Rochester & Gen.*, 4 Abb. [N. S.] 107; *Howe v. Peckham*, 6 How. Pr. 232; *Cropsey v. Sweeney*, 27 Barb. 310; *Madison Ave. B. Church v. Same*, 26 How. Pr. 72; *Mutual Benefit Life Ins. Co. v. The Supervisors of N. Y.*, 32 id. 359; *Livingston v. Hollenbeck*, 4 Barb. 10; *Craig v. Hyde*, 24 id. 313; *Kempsall v. Stone*, 5 Johns. Ch. 193; *Hatch v. Cobb*, 4 id. 559; *Pfeer v. Kissam*, 3 Edw. Ch. 129.) The consolidation, although made with the permission of the various States, constituted nothing more than a species of co-partnership of the various corporations, and this defendant is in the nature of a firm, and cannot be sued as one individual. (*Farnum v. The Blackstone Canal Co.*, 1 Sumner, 46; *Bk. of Augusta v. Earle*, 13 Peters, 588; *Ohio & Miss. R. Co. v. Wheeler*, 1 Black [U. S.], 295; *Racine & M. R. Co. v. Farmers' L. & Trust Co.*, 49 Ill. 331; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. [4 Otto] 444-7.) The plaintiffs are now precluded and estopped from recovering sums of money which should rightly be distributed as dividends, or go to the benefit of those who are now the common stockholders. (*Kent v. Quicksilver Mining Co.*, 78 N. Y. 184; *Coles v. The Bk. of Eng.*, 10 Ad. & Ellis, 437; *Rickard v. Seares*, 6 id. 474; *Manufacturing Bk. v. Hazzard*, 30 N. Y. 226; *Prendergast v. Turton*, 1 Younge & Collyer, 98; *Nichols v. Leeson*, 3 Atk. 573; *Currie v. Goold*, 2 Mad. 163; *Matthews v. The Great Northern R. Co.*, 5 Jur. [N. S.], part 1, 284, 290; *Stafford v. Stafford*, 1 DeGex & Jones, 193.) The acts of the legislatures of the several States through which the railroads mentioned in the pleadings and proofs in this action run are, so far as they relate to, provide for, or authorize the consolidation of the railroads in the adjoining States, in violation of subdivision 3 of section 8 of article 1 of the Constitution of the United States. (*Munn v. Illinois*, 94 U. S. [4 Otto] 13.) The laches and acquiescence of plaintiff's testator

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operated as a bar to this action. (1 Wait's Actions and Defenses, 152, 153, 198.)

*Lucien Birdseye* for respondents. This action did not involve the internal affairs of a foreign corporation in any such way as to deprive the court of jurisdiction. (*Da Costa v. Jones*, Cow. 729.) The Michigan Southern and Northern Indiana Railroad Company had lawful authority to issue the guaranteed stock in question, and to confer upon and attach to it the privileges claimed by the plaintiffs in this action. (*Prouty v. The M. S. & N. I. R. R. Co.*, 1 Hun, 663; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 181; *Davis v. Prop'rs of Meeting House in Lowell*, 8 Metc. 321; *Bates v. Androscoggin & Kennebeck R. R. Co.*, 49 Me. 491; *Rutland, etc., R. R. Co. v. Thrall*, 35 Vt. 536; *Williston v. M. S. & N. I. R. R. Co.*, 28 Penn. St. 321; *Lockhart v. Van Alstyne*, 31 Mich. 76; *McLaughlin v. Detroit, etc., R. R. Co.*, 8 id. 100; *Evansville, etc., R. R. Co. v. City of E.*, 15 Ind. 395; *Haselhurst v. Savannah R. R. Co.*, 43 Ga. 13; *Totten v. Tison*, 54 id. 139; *Kent v. Quicksilver Co.*, 12 Hun, 53; 78 N. Y. 159; *Howell v. Chicago & N. W. R. R. Co.*, 51 Barb. 378; *Bailey v. Hannibal & St. Joseph R. R. Co.*, 17 Wall. 97; 1 Dillon, 174; *Harrison v. Mexican R'y Co.*, 12 Eng. [Moak's Notes] 793; *Sturge v. Eastern Union R'y Co.*, 7 De Gex, McN. & G. 158; *Matthews v. Gt. N. R'y Co.*, 5 Jurist [N. S.], part 1, p. 284; *Corry v. Londonderry & En. R. R. Co.*, 29 Beav. 263; *Matter of Anglo-Danubian Steam Nav. Co.*, L. R., 20 Eq. 239; *Matter of London India Rubber Co.*, L. R., 5 id. 519; *Matter of Bangor, etc., Slab Co.*, L. R., 20 id. 59; *S. C.*, 13 Eng. [Moak's Notes] 606; *Matter of London Permanent Building Co.*, 17 Weekly, 513; affirmed, 21 L. T. [N. S.] 8; Redfield on Railways, § 237; Field on Corporations, 136; Green's Brice's Ultra Vires, 145.) The rights of the holders of this guaranteed stock against the corporation issuing it were created at the time of the creation of and agreement to issue the stock. (*Kortright v. Buffalo Com. Bk.*, 20 Wend. 91, 94; 22 id. 348; *Bank of*



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*Attica v. Manuf. & Traders' Bk.*, 20 N. Y. 501; *Ormsby v. Vt. Copper M. Co.*, 56 id. 623; *Hughes v. The Same*, 72 id. 207; *Presbyterian Congregation v. Carlisle Bk.*, 5 Barr. [Penn.] 345; *Slaymaker v. Bank of Gettysburg*, 10 id. 373; *Bates v. Androscoogin & Ken. R. R. Co.*, 49 Me. 491; *Davis v. Prop. of Meeting House in Lowell*, 8 Metc. 321; *Ellis v. Essex Merrimack Bridge Co.*, 2 Pick. 243; *Sargent v. Franklin Ins. Co.*, 8 id. 90, 98; *Field v. Pierce*, 102 Mass. 261; *Richardson v. Vt. & Mass. R. R. Co.*, 44 Vt. 613; *Bailey v. Hannibal & St. Joseph R. R. Co.*, 1 Dillon, 174; affirmed, 17 Wall. 96; *City of Ohio v. Cleve. & Toledo R. R. Co.*, 6 Ohio St. 489; *Pittsburg & C. R. R. Co. of Alleghany*, 63 Penn. St. 126; *Agricultural Bk. v. Burr*, 24 Me. 256; *Agricultural Bk. v. Wilson*, id. 273; *Chester Glass Co. v. Dewey*, 15 Mass. 93, 101; *Merchants' Bk. v. Cook*, 4 Pick. 405; *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Davis v. Bk. of England*, 2 Bing. 393; *Taylor v. Midland R. Co.*, 28 Beav. 287; *Sloman v. Bk. of England*, 14 Sim. 775; *Ashley v. Blackwell*, 2 Eden, 299; *Hoagland v. Belt*, 36 Barb. 57; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Mechanics' Bk. v. N. Y. & N. H. R. R. Co.*, 13 id. 599; *Ketchum v. Stevens*, 17 id. 499; *McCready v. Ramsay, Prest.*, 6 Duer, 574; *Stevens v. South Devon R. Co.*, 9 Hare, 313; *S. C.*, 21 L. J. Ch. [N. S.] 316; 12 Eng. L. & Eq. 229; *Sturge v. Eastern Union R. Co.*, 7 De Gex, McN. & G. 158; *S. C.*, 31 Eng. L. & Eq. 406; *Cranford v. N. E. R. Co.*, 3 Kay & J. 723; *S. C.*, 3 Jurist [N. S.], part 1, p. 1093; *Henry v. Gt. N. R. Co.*, 3 Kay & J. 723; *S. C.*, 3 Jurist [N. S.], part 1, p. 1117; *S. C.*, 1 Kay & J. 1; 3 Jurist [N. S.], part 1, p. 1133; *S. C.*, 1 De Gex & Jones, 606; *Matthews v. G. N. R. Co.*, 5 Jurist [N. S.], part 1, p. 284; *Corry v. Londonderry & E. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. Cas. 358; *S. C.*, 13 Eng. R. 793 [Moak's Notes]; *Lockhart v. Van Alstyne*, 31 Mich. 76.) The annual reports of the M. S. & N. I. R. R. Co., and the annual reports of the defendant corporation were properly admitted in evidence. (*London, B'r*

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& *S. C. R. Co. v. Goodwin*, 3 Exch. 320; 6 Railway Cases, 177; *Phil., W. & B. R. R. v. Howard*, 13 How. [U. S.] 307; *Eastern Union R. Co. v. Cochrane*, 24 Eng. L. & Eq. 495; *Ind., Cin. & Lafayette R. R. Co. v. Jones*, 29 Ind. 465; *C. C. & J. C. R. R. Co. v. Powell*, 40 Ind. 374; *King v. Mother-sell*, 1 Strange, 93, citing *Thetford's Case*, 12 Vin. Abr. 90, pl. 16; *King v. Martin*, 2 Camp. N. P. 100; *Bretton v. Cope*, Peake's Cases, 30; *Turnpike Co. v. McKean*, 10 Johns. 154; *Wood v. Jefferson Co. Bank*, 9 Cow. 194, 205; *Owings v. Speed*, 5 Wheat. 420, 423-4; *Baptist Church v. Mulford*, 3 Halst. 182; *Gray v. Turnpike Co.*, 4 Rand. 578; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82; *Hall v. Carey*, 5 Ga. 239; *Ryder v. Alton & Sangamon R. R. Co.*, 13 Ill. (3 Peck), 516; *Citizens' Passenger R. Co. v. City of Phila.*, 49 Penn. St. 251; *P. W. & B. R. R. Co. v. Howard*, 13 How. [U. S.] 307; *U. S. v. Gooding*, 12 Wheat. 460, 470; *American Fur Co. v. U. S.*, 2 Pet. 358, 364; *Franklin Bk. v. Steward*, 37 Me. 524; *Smith v. Palmer*, 6 Cush. 513, 520.) The dividends on the guaranteed stock in question are cumulative; that is, if not regularly paid from time to time, they accumulated as arrears to be paid afterward, before any dividends were paid upon the common stock. (Lindley on Part. 655\*; *Stevens v. South Devon R'way Co.*, 9 Hare, 313; 21 Alb. L. J. Rep. Ch. [N. S.] 816; 12 Eng. L. & Eq. 229 [S. C.]; *Sturge v. The East Union R'way Co.*, 7 De Gex, McN. & G. 158; *S. C.*, 31 Eng. L. & Eq. 406; *Crawford v. The North-eastern R'y Co.*, 3 Jur. [N. S.] part 1, p. 1093; *S. C.*, 3 Kay & J. 723; *Henry v. Great N. R'y Co.*, 3 Jur. [N. S.], part 1, p. 1117; *S. C.*, 1 Kay & J. 1; 3 Jur. [N. S.], part 1, p. 1133; *S. C.*, 1 De Gex & Jones, 606; *Matthews v. The Gt. Northern R'y Co.*, 5 Jur. [N. S.], part 1, p. 284; *Corry v. The Londonderry & Enniskillen R. Co.*, 29 Beav. 263; *Coey v. Belfast & County Down R. Co.*, Irish Rep., 2 C. L. 112; *Smith v. Cork & Brandon R. Co.*, *ubi supra*; *Matter of London India Rubber Co.*, L. R., 5 Eq. Cas. 519; *Matter of Bangor & Port Madoc Slate & Slab Co.*, L. R., 20 Eq. 59; *Melhado v. Hamilton*, 21 Wend. 619; *Williston v. M. S. & N. I. R. R. Co.*, 18 Allen, 400,

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405; *Taft v. H. P. & F. R. R. Co.*, 8 R. I. 310, 334-5; *Prouty v. M. S. & N. I. R. R. Co.*, 1 Hun, 653; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321; *Totten v. Tison*, 54 Ga. 139; *Lockhart v. Van Alstyne*, 31 Mich. 76-79, etc.; *McLaughlin v. Detroit & Mil. R. R. Co.*, 8 id. 100; *Jones v. Terre Haute & Rich'd R. R. Co.*, 57 N. Y. 196; *Hill v. Newichawanick Co.*, 8 Hun, 459; affirmed, 71 id. 593; *Rider v. Alton, etc., R. R. Co.*, 13 Ill. 516, 520; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Union B'k v. State*, 9 Yerg. 490; *Crawford v. North-east R. Co.*, 3 Kay & J. 723, 744; *Henry v. Gt. N. R. Co.*, 1 De G. & J. 616, 637; *State of Conn. v. Norwich & Worcester R. R. Co.*, 30 Conn. 290; *Everhart v. Westchester & Phil. R. R. Co.*, 28 Penn. St. 329; *Rutland & B. R. R. Co. v. Thrall*, 35 Vt. 536, 545; *Correy v. Londonderry & En. R. Co.*, 29 Beav. 263; *Smith v. Cork & Brandon R. Co.*, 5 Ir. Eq. 65; *Hutton v. Scarborough Cliff Hotel Co.*, 2 De & Sm. 574; 13 W. R. 631; *Harrison v. Mexican R. Co.*, L. R., 19 Eq. C. 358; *S. C.*, 12 Eng. 793 [Moak's Notes]; *St. John v. Erie R. Co.*, 10 Blatchf. C. C. 271; affirmed, 22 Wall. 136.) The right of the party suing for these arrears is not affected by the fact that he is a holder of the shares by purchase, nearer or more remote, instead of being the original subscriber for the stock, and the original holder of the certificate. (*Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114; *S. C.*, 13 Jur. 602; 27 Eng. Ch. 114; 2 McN. & G. 389; *S. C.*, 2 Hall & Twell. 201; 14 Jur. 491; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321.) The objection that the consolidation of the railroad companies of different States to form the present defendant could only be effected or made under and by virtue of an act or acts of the Congress of the United States, and not of the different States thereof, is wholly untenable. (*Farnum v. Blackstone Canal Co.*, 1 Sumn. 48; *The Racins & Mississippi R. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331; 9 Am. L. Reg. 260; *P., W. & B. R. R. Co. v. Maryland*, 10 How. 376, 392; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 297; *Milnor v. The N. Y. & N. H. R. R. Co.*, 53 N. Y. 363; *Philadelphia, W. & B. R. R. Co.*

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Opinion of the Court, per MILLER, J.

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v. *Maryland*, 10 How. 376, 392; *P., W. & B. R. R. Co. v. Howard*, 13 How. 307, 322, 323; *Clearwater v. Meredith*, 1 Wall. 25, 40; *Peck v. Chicago & N. W. R. R. Co.*, 4 Otto, 164; *Shields v. State of Ohio*, 26 Ohio St. 86; 5 Otto, 319; *State of Ohio v. Sherman*, 22 Ohio St. 411; *Prouty v. L. S. & M. S. R. Co.*, 52 N. Y. 363; *Matter of Sage, etc.*, 70 id. 220; *Bishop v. Brainard*, 28 Conn. 289; *Platt v. N. Y. & Boston R. R. Co.*, 26 id. 514; 57 How. Pr. 26; *Sturges v. Crowninshield*, 4 Wheat. 122, 191; *Ogden v. Saunders*, 12 id. 213; 1 Kent's Com. 388. The statute of limitations does not bar the present action. (*Olcott v. Tioga R. R. Co.*, 20 N. Y. 210; *Thompson v. Tioga R. R. Co.*, 36 Barb. 79; *Rathbun v. Northern Cent. R. Co.*, 50 N. Y. 656.) The case presented by the plaintiffs is one of equitable cognizance, and the plaintiffs' remedy is not merely at law. (*Stevenson v. Buxton*, 15 Abb. 352; *Coe v. Belfast & County Down R. Co.*, 1 R., 2 Ch. 112, 123.) The stockholder was entitled to interest on the dividends he was to have received; at least, from the time the net earnings began to be appropriated by the corporation to the payment of dividends to the holders of common stock. (1 Hun, 667; *Conn. Mut. F. Ins. Co. v. Cleveland, etc., R. R. Co.*, 44 Barb. 9; *Hollingsworth v. City of Detroit*, 3 McLean, 472.) Every purchaser and holder of scrip for shares of the stock and of the shares evidenced thereby became entitled to and invested with all the rights, privileges and benefits attached thereto, or held or owned by the original subscribers for the stock, and all the intermediate holders, down to the time when the same became vested in such purchaser. (*Bagshaw v. East Union R. Co.*, 2 McN. & Gor. 389; *S. C.*, 2 Hall & Twell. 201; 14 Jurist, 491; 7 Hare, 114, and 27 Eng. Ch. 114; 13 Jur. 602; *Jones v. Terre Haute R. Co.*, 29 Barb. 353; *Phelps v. Farmers' Bk.*, 26 Conn. 269; *Westchester & Phil. R. R. Co. v. Jackson*, 77 Penn. St. 321; Angell & Ames on Corporations [10th ed.], § 567, note a.)

MILLER, J. The plaintiffs seek by this action to compel the defendant to pay dividends of ten per cent per annum from

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June, 1857, to February, 1863, upon certain shares of stock owned by the plaintiffs' testator, which were issued as preferred and guaranteed stock by The Michigan Southern and Northern Indiana Railroad Company, in the year 1857. The issue of stock amounted to \$3,000,000 and the company failed to pay the dividends now sought to be recovered. The defendant, under acts of consolidation passed by the legislatures of the States through which the roads ran, assumed the debts and obligations of said company. The certificate of said stock is issued by the company and stated as follows: "Said stock is entitled to dividends at the rate of ten per cent per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of the said company; and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent per annum, and the payment of dividends as aforesaid is hereby guaranteed." At the top of the certificate after the designation of the name of the company, the number of scrip and the number of shares, was inserted the words, "guaranteed ten per cent stock." None of the dividends provided for were paid until 1863, when a dividend of five per cent, out of the net earnings of the previous six months, was for the first time declared, and no payment has been made upon the arrears of dividends which have accumulated upon said stock.

Objections were made upon the trial to the introduction of the book of minutes of the company, containing certain resolutions of the directors of The Michigan Southern and Northern Indiana Railroad Company, which authorized the issue of guaranteed stock of the company to be denominated "construction stock," and the payment of dividends upon the same at the rate of ten per cent per annum. The objection to these resolutions and proceedings is based mainly upon the ground that all proceedings prior to the issuing of the certificate became merged in the same, and such certificate became the contract between the company and the stockholders, which could not be varied by the other testimony. The resolution of the

directors declared that the dividends at the rate named "shall always be paid upon said guaranteed stock out of any net earnings of the company, before any portion of said net earnings shall be applied to the payment of dividends upon the remaining stock of the company," and the book of minutes, containing this and other proceedings relating to the matter, was offered in evidence for the purpose of showing authority for the issue of the stock in question. Such evidence is frequently resorted to in cases relating to the power to create preferred or guaranteed stock, or the right to receive dividends upon the same. (*Stevens v. South Devon R. R. Co.*, 9 Hare, 313; 21 L. J. Ch. Rep. [N. S.] 816; 12 Eng. L. & E. 229; *Sturge v. E. U. R. R. Co.*, 7 DeGex, McN. & G. 158; 31 Eng. L. & Eq. 406; *Crawford v. N. E. R. R. Co.*, 3 Jur. [N. S.] part 1, 1098; *Henry v. G. N. R. R. Co.*, id. 1117, 1133; *Matthaur v. G. N. E. R. R. Co.*, 5 id., part 1, 284; *Corey v. Londonderry & E. R. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. L. Co.*, L. R., 19 Eq. Cas. 358; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.) In the case last cited, the charter, by-law and resolutions of stockholders, and other evidence of a similar character, were received without any apparent objection, and are referred to in the opinion in connection with the certificate. The stock certificate, although on its face in due form, may be the subject of inquiry to ascertain whether it was fraudulently issued. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599.) In fact the certificate of itself is merely evidence tending to show the ownership of the shares. (*Bates v. A. & K. R. R. Co.*, 49 Me. 491.) The resolutions, the book of minutes, annual reports and other proceedings were competent, for the purpose of showing the real character of the transaction and as a part of the same.

The claim of the defendant is, that the certificate of itself did not give a preference, and that the guaranty only authorized the dividend described in the certificate, and that it was error to admit such evidence for the purpose of changing, varying or interpreting the contract. We think that the whole

proceeding relating to the issue of the stock may be taken in connection as constituting one and an entire transaction. The resolutions were competent evidence to show authority to issue the stock; the proposal and other proceedings to carry out the purpose of the resolutions and the certificate as evidence of what stock was actually issued, and in part the terms upon which it was so issued. Altogether these papers evince what the intention was. Without the certificate, the shareholder would be entitled to the shares which had been paid for, and the dividends and the certificate did not circumscribe or limit his rights in this respect, but render them more definite and specific. We think, therefore, that the evidence objected to cannot be considered as extrinsic evidence to vary, modify or explain the written contract, or any uncertainty or ambiguity relating to such contract. We are referred by the appellant's counsel to several reported cases which uphold the doctrine that where there is an uncertainty of meaning upon the face of the contract, owing to its wording, and not to any collateral circumstances, other evidence is not competent. (See *Miller v. Travers*, 8 Bing. 244; *Sanderson v. Piper*, 5 Bing. N. C. 425; *Reed v. Proprietor of Locks*, 8 How. [U. S.] 274; *Sargent v. Adams*, 3 Gray, 72.) These decisions relate to the construction of a particular instrument alone, and not to a case where stock is issued by a corporate body, and the circumstances, as well as the nature of the contract, and the acts and proceedings connected with such issue, are to be taken into consideration. The cases cited, therefore, are not analogous.

Assuming, however, that any doubt may arise as to the competency of the evidence, we are of the opinion that, from the language of the certificate and the guaranty, the plaintiffs were entitled to the dividends. By the certificate alone the intestate was entitled to dividends at the rate of ten per cent per annum, payable semi-annually out of the net earnings of the company, and it is agreed by the guaranty that these dividends shall be paid as provided. The contract is explicit as to the amount and the source out of which the dividends shall be paid, and the times when payable annually are also designated. The

design evidently was that the stockholders should realize ten per cent each year, payable semi-annually upon the investment actually made. As they were entitled to receive such dividends from the net earnings and to have ten per cent upon the investment, and this was absolutely guaranteed, it necessarily follows that in the event that such earnings should not reach that amount or at any time failed, the dividends must afterward be paid from the net earnings when earned and received by the company. The reasonable and fair interpretation of the contract is, that the dividends were not only to be preferred, but, being guaranteed, were cumulative and a specific charge upon the accruing profits, to be paid as arrears, before any other dividends were divided upon the common stock. The doctrine that preference shareholders are entitled to be first paid the amount of dividends guaranteed, and of all arrears of dividends or interest before the other shareholders are entitled to receive any thing, and although they can receive no profits where none are earned, yet as soon as there are any profits to divide they are entitled to the same, is fully supported by authority. In *Henry v. G. N. R. R. Co.*, 3 Jurist [N. S.], part 1, 1117, affirmed upon appeal, reported in 3 Jurist, 1133, the right of preference rather than that of guaranteed stockholders to dividends in arrears was involved, and it was held by the Vice-Chancellor that the company had no right to declare a dividend so as to affect the right of preference stockholders, and that they were entitled to their full dividend for the period which had elapsed since the last payment of dividend, before the ordinary stockholder can take any dividend whatever. Upon appeal the decision was affirmed, and it was held that preference shareholders had a right to dividends at the stipulated rate chargeable exclusively as profits, and payable before any thing is divided among the common shareholders. The Lord Chancellor, CRANWORTH, says: "That if, on the declaration of a dividend, the fund to be divided should be insufficient to satisfy the claims of the shareholders entitled to preference, those shareholders will be entitled to be paid in full out of all subsequent dividends before the ordinary share-



holders can receive any thing." In the case last cited there were four classes of preferred stock, and the same principle is involved as arises in the case at bar. In *Cransford v. N. E. R. R. Co.*, 3 Jurist [N. S.], part 1, 1093, preference dividends were held to be a charge upon the profits of the company for all time, to the extent of the preference dividend held out as payable on the preference shares. The condition here was, that the preference shares should be entitled to a certain rate per annum for the periods named, and in part in perpetuity thereafter on the amount actually paid in. It was said that the words "interest" and "dividends" should be treated as synonymous. See, also, *Sturge v. E. N. R. R. Co.* (31 Eng. L. & Eq. 406) which decides that the holders of preference shares are entitled to be paid the amount of arrears out of any money belonging to the company applicable to such payment, before any payment shall be made by the company, to the ordinary shareholders in respect to dividends or interest. It is claimed that in the last two cases it was held that the preference dividends were a charge, because the contract was not for the payment of dividends at fixed times, but because the dividends were payable out of the revenues of the company at any time; but we think that those decisions were not made upon any such ground, but upon the principle that preference dividends must be paid before any others, which is well established and supported by the cases cited, as well as numerous other authorities. (See Lindley on Part. [4th ed.] 796, 798; *Stevens v. South Devon R. R. Co.*, 9 Hare, 313; 12 Eng. L. & Eq. 229; *Matthews v. G. N. R. R. Co.*, 5 Jurist [N. S.], part 1, 284; *Corey v. L. & E. R. R. Co.*, 29 Beav. 263; *Harrison v. Mexican R. R. Co.*, 19 Eq. Cas. 358.)

Even if there was a variation, as claimed, we are unable to perceive how this can make any difference; for, as we have seen, the stock being both preferred and guaranteed, the inference to be drawn from the nature of the obligation is certainly very strong upon the certificate itself, and, we may add, conclusive that a specific sum should be paid as dividends out of

made a contract to pay certain dividends upon a contingency, which was the acquisition of net earnings by the company, and the right only becomes complete upon the happening of such contingency, and that the holder of the stock with whom the contract was made would become a creditor upon the acquisition of such net earnings, and that the plaintiffs cannot claim these dividends in their capacity as stockholders, for they have never been declared but only in the capacity of one who has made a contract with a corporate body. We are unable to perceive the force of this position, for conceding that the right of the plaintiffs depends upon a contract, that contract is connected with, relates to and constitutes an integral part of the plaintiffs' right as a stockholder. It cannot be separated from the rights accruing by virtue of the stock which the plaintiffs hold; and being thus a part and parcel of the same, it passes with the transfer as one of its incidents, and as composing an essential element thereof. A sale or assignment of the stock transferred by the operation of law all benefits to be derived from the same, and all profits, income or dividends or right to dividends by contract, which formed a constituent, valuable and an inseparable portion of the stock. When the contingency happened specified in the contract, the right to dividends became fixed, and existed independent of any act of the corporation or its officers. It became absolute and perfect in the stockholder without a declaration to that effect, and passed as an incident of the stock upon the transfer.

The dividends were not a chose in action arising from the contract, which could only be derived by a separate assignment, and no such instrument was required to convey or transfer a right to the same. Although usually there is no special contract of the company with the holders of stock to declare dividends, yet that does not alter or change the effect of the contract by which the plaintiffs hold their stock and become entitled to dividends thereon; for in both cases the dividends follow the stock itself and belong to the owner. We think it cannot be maintained, upon any sound principle, that the contract for the payment of dividends continues to each stock-

holder only during the time he holds the stock and accrues only to his benefit during that period, and that a separate and distinct assignment of the dividends was essential in order to confer title upon the owner. Such a conclusion is adverse to the general rule which is upheld by authority, that a transfer of stock of a corporation carries with it to the transferee its proportionate share of the assets of the company, including dividends which have not been declared, and all the incidents and advantages which appertain to the rights of a shareholder. The case of *Hill v. The Newitchawanic Co.* (8 Hun, 459), affirmed in this court in 71 N. Y. 593, on appeal, which is relied upon by the appellant's counsel, is not analogous, as the dividend of previous earnings had virtually been declared before the sale, although the time of payment was not fixed, but was left discretionary with the agent. A distinction is recognized in the opinion between a dividend already declared, payable at a future day, and a division of future earnings; and it was properly held that the former owner, and not the purchaser, was entitled to the dividend.

We think there was no error in the judgment of the trial court because it decrees specific performance and grants equitable relief. The cause of action is of an equitable character, and the remedy demanded cannot be obtained by an action at law. It is not to recover the dividends alone, but to compel the defendant to do what is necessary and proper for the specific performance of the contract and agreement entered into by the Michigan Southern and Northern Indiana Railroad Company, in reference to the guaranteed or construction stock issued by it. The plaintiffs pray that an account be taken, that the defendant be compelled specifically to perform the agreement and enjoined from declaring or paying any dividends upon the common or unpreferred stock of the corporation, until the holders of the guaranteed or construction stock are all paid. Without some action of the officers of the corporation, there is no power to pay the dividends; and as they are to be paid out of the net earnings, this cannot be attained in any other manner.

The English cases already cited (*supra*), where the Court of Chancery interfered to restrain the payment of dividends to shareholders of a lower class until the arrears due those of a higher were paid, were all equitable actions. In the only case excepted from this general rule, the right of recovery depended upon an act of Parliament, and there had been an appropriation of the money. (*Coe v. Belfast & County Down R. R. Co.*, 2 Irish [C. L. S.], 112.)

While, as a general rule, courts of equity will not exercise visitatorial powers over corporations, and its officers are the sole judges as to the propriety of declaring dividends, and in this respect the court will not interfere with a proper exercise of their discretion, yet where the right to the dividend is clear and fixed by the contract, and requires the directors to take action before it can be asserted by a suit at law, and a restraint by injunction is essential to maintain the right of the stockholder, the interposition of a court of equity is a proper exercise of its power and should be upheld. In such a case the remedy at law is inadequate, and a court of equity alone can grant the proper relief. In regard to the controversy involved in this action, it is apparent that it is not one of legal cognizance, and a perfect remedy can only be obtained by an equitable action. The judgment here requires a specific performance of the contract, and such relief could not be obtained by an action to recover the dividends.

We are also of the opinion that the liability of the defendant, as the representative of the consolidated corporation and as a corporate body, is sufficiently established, and that it cannot be claimed that the defendant is in the nature of a firm and cannot be sued alone. Upon the trial, it was admitted that the defendant was a corporation duly created and organized as a corporate body, under the laws of several States, and when the defendant's corporation was formed, the several corporations which were consolidated to form the defendant owned and operated one continuous line of railroad running through the several States named; and that the defendant would not question its own corporate existence or that of the several corporations from

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which it was formed. The defendant is a corporation *de facto*. It filed its agreement and acts of consolidation with the secretary of State, a copy of which, duly certified, is made evidence in all courts (Laws of 1869, chap. 917, § 2, subd. 2), and was introduced in evidence upon the trial, as well as the laws of other States, and those together appear to establish sufficiently the existence of defendant *de jure* as a corporate body. It is also recognized as a corporation in several of the decisions of this court, and the validity of the consolidation is considered and affirmed. It is held that where two railroads are consolidated, as far as one of the creditors of one of the original companies is concerned, the consolidated company is the successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditor has no claim against it upon their original contract, but only by virtue of its assumption of the obligations of the old companies. (*Prouty v. L. S. & M. S. R. R. Co.*, 52 N. Y. 363.) The distinct point was taken, in the case last cited, that the consolidation was not a surrender of personal identity or corporate existence by either of the corporations. (See, also, *Chase v. Vanderbilt*, 62 N. Y. 307; *In the Matter of Sage*, 70 id. 220.)

We have carefully examined the cases cited to sustain the position contended for, but none of them present the characteristic features which distinguish the case at bar, or hold that under the facts and circumstances presented upon the trial of this action the defendant could not be sued as a single corporation, and is not liable as such. Nor are we able to discover any effect of the principle laid down which is not the legitimate result and the necessary consequence of the arrangement under which the consolidation of the various corporations was accomplished and became merged in the defendant. The effect of the consolidation evidently was that the preferred stock should constitute a part of the liability, and no reason exists why the stockholders should be compelled to prosecute their remedy against one of the corporations alone with whom the contract was originally made.

The claim that the plaintiffs have been guilty of negligence and laches in asserting their right, and have so long acquiesced in the manner of distributing the funds and property of the company that it is too late to complain, and that the doctrine of an estoppel *in pais* applies, demands serious consideration. The question is, whether the delay in bringing the action precludes a recovery, under the circumstances presented. The defendant's obligation arises upon a contract, and the right to the dividends became fixed thereby, the same as the payment of any other demand which is provided for by the terms of an agreement. The failure to pay makes the right of action perfect, and under ordinary circumstances this can only be defeated by the statute of limitations. But was there such an acquiescence in the acts of the defendant, such laches and failure to proceed and claim the dividends by the plaintiffs or their testator, as in any way operated upon or induced the defendant to act differently from what it otherwise would have done, or as injured or affected its interests? The principle applicable to such case is laid down by Lord DENMAN, in *Pickard v. Sears* (6 Ad. & El. 474), as follows: "The rule of law is clear that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Nor is it essential to an equitable estoppel that the party should design to mislead, and it is sufficient if his acts were calculated to mislead and have misled another acting upon it in good faith and exercising reasonable care. (*Manuf. Bank v. Hazzard*, 30 N. Y. 226.) Within the rule stated, can it be said that the defendant was misled by the conduct of the plaintiffs, and that thereby it was induced to act differently than it otherwise would have done, or to change its former position? A recurrence to the facts disclosed upon the trial evinces that the action of the defendant was not based at all upon the apparent acquiescence of the plaintiffs in its neglect to pay the dividends. It appears that

there has been, ever since the expiration of the time when the dividends were due, an active and continuous litigation, and a sharp controversy in the courts with other parties against the old corporation and the defendant, by stockholders who are similarly situated with the plaintiffs, to recover dividends upon the preferred stock. Some of the annual reports introduced in evidence upon the trial contain references to the pendency of these actions for the arrears of dividends, and show clearly and beyond any controversy that the defendant was well-advised and had full knowledge of the claim of the preferred stockholders. The pleadings, affidavit for injunction, and the injunction issued in one of the suits brought, in which the defendant was restrained from receiving funds from the old corporation and otherwise enjoined, which was also proved, show conclusively the existence of these litigations and bring the knowledge of the same directly to the defendant's officers. The defendant necessarily was acquainted with the character of the litigation, with the questions involved and the claim of the preferred stockholders to the dividends; and in the face of these facts, with full notice of the nature of the claim, has no ground for insisting that it would have acted otherwise if the plaintiffs had sued at an early day. It was not required that each particular stockholder should sue for his share of the dividends to preclude the defendant from claiming an acquiescence and estoppel; and it is quite sufficient that it was advised of the character of the claim of the respective stockholders. The plaintiffs and other stockholders were entirely justified in awaiting the result of suits pending without incurring the hazard of losing their rights on account of the lateness of their demand. A right of action existed in favor of the stockholders against the corporation, which continues against the defendant, who has assumed and is bound to pay its debts and obligations, which right has not been lost by delay, acquiescence or laches. The defendant has in fact acted without regard to these stockholders' interests and diverted funds to which the plaintiffs were entitled, with full knowledge of the facts and without being misled or deceived by any misconduct

or any want of action on their part. The doctrine of estoppel or of acquiescence has no application in such a case, and cannot be invoked to aid the defendant. The elements of an estoppel are wanting, as there has been no mistake or misleading, nor any injury arising from the delay in bringing an action. It cannot be urged upon any valid ground that the conduct of the defendant in reference to these dividends was in any respect influenced or affected by the plaintiffs' delay to sue, or that it labored under any misapprehension, or was ignorant of or had not complete knowledge of the nature of the plaintiffs' claim.

We have examined the cases cited in this connection by the appellant's counsel, and none of them sustain the position that where the circumstances indicate a full knowledge of the facts in regard to a claim which may be made, and where the party was advised, by the presentation of claims of other parties, of a like character, which were the subject of litigation, that the doctrine of laches and acquiescence can be invoked as a defense. In each of these decisions there was strong and direct evidence to establish acquiescence in the action which had been taken, and the parties were suffered to proceed without notice, so as to warrant the conclusion that the subsequent claimants assented to what was done, and thus ratified the action taken. (See *Kent v. Quicksilver Mining Co.*, 78 N. Y. 184; *Coles v. Bank of England*, 10 Ad. & El. 437; *Pickard v. Sears*, *supra*; *Prendergast v. Turton*, 1 Younge & Col. 98; *Stafford v. Stafford*, 1 DeG. & J. 193; *Nichols v. Leeson*, 3 Atk. 573; *Currie v. Goold*, 2 Mad. Ch. 426; *Matthews v. G. N. R. R. Co.*, 5 Jurist [N. S.], part 1, 284, 290.) We do not deem it necessary to consider these cases more fully, and it will be found that none of them are adverse to the views we have expressed.

We are also of opinion that the plaintiff's demand is not barred by the statute of limitations. The claim arose originally against a foreign corporation, and the action is based upon the assumption by the defendant of its debts and liabilities under the articles of consolidation, which, by an act of the legislature



and the filing of the articles in the office of the Secretary of State, took effect in 1869. A foreign corporation sued in this State cannot avail itself of the statute of limitations. (*Olcott v. The Tioga R. R. Co.*, 20 N. Y. 210; *Thompson v. The Tioga R. R. Co.*, 36 Barb. 79.) And this rule obtains, although it has before the commencement of the action for the time specified in the statute continuously operated and carried on a railroad in this State, and has property and officers therein. (*Rathbun v. N. C. R. R. Co.*, 50 N. Y. 656.) The statutory time for bringing the suit, if it can be regarded as in any sense applicable, would not begin to run until the date of the consolidation, and the action was brought within six years after that period.

There is, we think, no force in the position that the acts of the legislatures of the several States through which the railroads run, so far as they relate to or authorize the consolidation in the adjoining States, are in violation of subdivision 3 of section 8 of the first article of the Constitution of the United States, which confers upon Congress the power to "regulate commerce with foreign nations and among the several States." It is not claimed that Congress has legislated in respect to the subject, or assumed to exercise the power conferred by the Constitution, and it has not yet been decided that the provision cited requires that the power conferred should be exercised by Congress alone, and is taken away entirely from the control of the State legislatures. The conclusion, therefore, is inevitable that in the absence of such legislation by Congress, the power exists in the State to legislate upon the subject. It is not the power itself, but its exercise, which is inconsistent with the exercise of the same power by the State legislature. It is the establishment of such laws by Congress as are inconsistent with the laws of the State, and not the right to establish a uniform system. While, then, Congress has the power to establish uniform laws on the subject of bankruptcy, this does not exclude the right of the State to legislate on the subject, except where the power is actually exercised by Congress and the State laws conflict with those of Congress.

(*Ogden v. Saunders*, 12 Wheat. 213; *Sturges v. Crominshield*, 4 id. 122, 191; 1 Kent's Com. 388.) The same rule applies to the legislation which has been considered. The case of *Munn v. Illinois* (94 U. S. 113) is cited by the appellant's counsel; and it is there held where warehouses are situated within a State, it may prescribe regulations for them, notwithstanding they are used as instruments by those engaged in inter-State, as well as in State commerce; and until Congress acts in reference to their inter-State relations, such regulations may be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction; and such a law is not repugnant to the Constitution. We are unable to discover any thing in the case cited which conflicts with the right of the States to pass the laws referred to in regard to the consolidation of the railroads in question, and within this decision, as well as the authorities cited, we are brought to the conclusion that the acts in question were constitutional and valid.

We have examined the various objections taken to the findings and the refusals to find, and the rulings in regard to the evidence upon the trial, and none of the decisions of the court were erroneous in respect to the same. The motion to dismiss the complaint and for judgment was also properly denied. Nor was there any error in the allowance of interest upon the dividends.

The judgment should be affirmed.

All concur, except RAPALLO and ANDREWS, JJ., taking no part.

Judgment affirmed.

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Upon a motion for a reargument in this and other similar cases decided with it, the following opinion was handed down.

MILLER, J. The motion for a reargument in these cases is founded upon the ground that the appellant's counsel omitted to discuss the question as to the legality of allowing interest

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upon the dividends, and that several decisions and authorities upon that question were not cited upon the brief of the appellant's counsel and the attention of the court was not drawn to the same. The position of the defendant's counsel is, that the ten per cent dividends which were to be paid by the contract and certificate upon the new stock issued were in the nature of interest and given as an inducement to the parties subscribing to advance this necessary amount of money to pay certain obligations of the corporation in a period of emergency and that the allowance of interest thereon in point of fact would be interest upon interest, or compound interest which is unauthorized by law, and which is never allowed except in case of an express agreement to that effect. The general rule is well established that compound interest cannot be recovered by law without an agreement to pay the same entered into after it has become due. (*State of Connecticut v. Jackson*, 1 Johns. Ch. 13; *Ackerman v. Emmott*, 4 Barb. 649.)

Under ordinary circumstances interest is not recoverable upon dividends declared without a previous demand and a refusal to pay, and the question arises whether the rule stated is applicable under the state of facts presented in the case at bar. Under the resolutions of the stockholders and board of directors of the Michigan Southern and Northern Indiana Railroad Company the stock proposed to be issued was to be guaranteed and preferred, and certificates were issued to that effect, by which the dividends were to be paid semi-annually out of the net earnings of the company before any portion should be applied to the payment of dividends upon the remaining stock. Upon the 28th of February, 1865, the guaranteed stock had been reduced by purchase, cancellation and otherwise and a surplus remained of \$743,000, which could have been applied to the payment of the arrears of the dividends of the stock in question, including that of the plaintiff. On the 1st of August, 1864, the directors in open violation of their agreement declared and paid a dividend upon the common stock of \$277,664.20, and in March, 1865, a like dividend. These amounts were sufficient to pay all arrears of dividends on guar-

anted stock which were outstanding at the time this action was brought. Other sums were afterward paid for dividends upon the common stock in violation of the rights of the holders of guaranteed and preferred stock. These moneys, which should have been appropriated to the payment of the dividends due the preferred stockholders, were thus unlawfully diverted from that purpose. The security taken for the money advanced was not in the nature of an obligation for the repayment of money alone, nor the benefits or payments to be derived therefrom were not in substance or in effect interest upon money loaned merely, and therefore did not bear the character of ordinary obligations where the allowance of interest would be compounding the same, which the courts have regarded with disfavor and as unauthorized. The preferred stockholders merely obtained thereby an interest in the assets of the company which entitled them to the ordinary dividends the same as the common stockholders. The agreement to pay preferred or guaranteed dividends was an inducement to take the stock, and the dividends provided for were the only return for the moneys advanced. The security therefore taken differs from an annuity or ordinary dividend or an agreement to pay interest. This rule should more especially prevail where the sums to be paid were allowed only from time to time out of the net earnings which ought to have been applied and were wrongfully appropriated to the payment of dividends to the common stockholders who were not entitled to the same before the others were paid. By this illegal appropriation the common stockholders received dividends and if they chose could have invested the same and thus drawn interest thereon, while the preferred stockholders have no such advantage. Having thus misappropriated the funds out of which the interest was to be paid to the preferred stockholders, the company should be compelled to pay interest on the sums which their own act prevented from being paid. They refused to fulfill the contract or to do what was required by law to pay the plaintiff the dividend to which he was entitled, and compelled him to bring an action to enforce the declaration of divi-

dends and under these circumstances have no claim to be exempted from the payment of interest as damages as a consequence of their failure to perform a plain obligation. The plaintiff became damnified by the refusal of the company to declare a dividend when they had funds for that purpose and by the diversion of such funds his right to interest accrued by being compelled to institute an action to enforce the same. It may also be remarked that there were no specific dividends to demand until they had been declared, and hence the demand would have been unavailable and the case differs entirely from one where dividends have been declared or an annuity has been received or where money has been appropriated or received for such a purpose and nothing remains to be done except to pay it over when demanded by the person who is entitled to receive the same. Nor does it interfere with the right of the plaintiff to interest on dividends because this is an equitable action, for as no dividends had been declared and the plaintiff's remedy in part was to compel the officers of the company to declare such dividends, no other action could properly be brought in which adequate relief could be obtained. It is enough, we think, that the plaintiff's right to the interest exists to authorize the court to enforce his claim in this action.

The plaintiff's case bears no analogy to that of copartnerships when one of the partners is not entitled to interest as against the others. Nor is there any such laches in enforcing the plaintiff's demand, or by a failure to make a demand, or by bringing a suit at an earlier period as estops him from claiming such interest.

The learned counsel for the appellant has cited several English authorities where the courts have refused to allow interest to annuitants upon the arrears of an annuity although there were circumstances which before induced the courts to allow it. (*Aylmer v. Aylmer*, 1 Malloy, 87; *Anderson v. Dwyer*, 1 Schoales & Lefroy, 301; *Booth v. Lycester*, 3 Mylne & Craig, 459; *Earl of Mansfield v. Ogle*, 4 De G. & J. 38; *Torre v. Brown*, 5 House of Lords Cases, part 1, 555; *Booth v. Coulton*, 7 Jurist [N. S.], part 1, 207; *Jenkins v. Bryant*,

## Statement of case.

16 Simons, 272.) We have given to these cases the most careful consideration and they appear to establish a practice in the English courts to refuse interest upon annuities except under special circumstances, and one of these (3 Mylne & Craig, 459) appears to have been decided upon a question of intention. The rule seems to have been of modern origin, for the earlier cases are not entirely in the same direction. (*Litton v. Litton*, 1 P. Wms. 541; *Ferrers v. Ferrers*, Talbot's Cases, 2; *Robinson v. Cumming*, 2 Atk. 579; *Drapers' Co. v. Davis*, id. 211; *Morris v. Dillingham*, 2 Ves. Sr. 170; *Morgan v. Morgan*, 2 Dick. 643.) Assuming, however, that the modern decisions are controlling, cases of this kind are not in point when the claim to interest rests upon an unlawful appropriation of moneys which were properly applicable to the payment of arrears of dividends as is the case here. And where the party who is bound to pay is in fault and diverts or fails to apply the money in his hands for the purpose of paying dividends which are legally due, the rule laid down as to annuitants cannot shield it from the consequences of the default. Such party is not exonerated for the apparent reason that he was lawfully bound to pay and could pay, had he chosen to do so, and utterly failed and neglected to perform this conceded duty and obligation.

For the reasons stated, without considering the question as to the right to a reargument, we are of the opinion that the motion should be denied.

All concur.

Motion denied.

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DAVID S. DUNCOMB et al., Trustees, etc., v. THE NEW YORK, HOUSATONIC & NORTHERN RAILROAD COMPANY et al.

The director of a corporation occupies a fiduciary position, and so is within the rule disabling one intrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust.

The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith.

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But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received.

Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt.

The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation.

But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him for value and in good faith of bonds so bought that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title. Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter.

Under the provision of the General Railroad Act (sub. 10, § 28, chap. 140, Laws of 1850) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds and to mortgage its property and franchises "to secure the payment of any debt contracted for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified.

Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt.

The L. & I. Co. by its charter (§ 5, chap. 730, Laws of 1871) is authorized to "advance moneys \* \* \* upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced.

Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, *held*, that such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds.

Also *held*, that one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary and was embraced within the authority to issue bonds.

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A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem did not appear. *Held*, that as no right to sell was shown, the holder of the bonds must still be treated as pledgee.

Where a question arises under a Federal law and respects a corporation created by its authority, the rulings of the Federal courts must be followed.

Accordingly *held*, that the decision of the United States Supreme Court, in *G. M. Co. v. Nat. Bank* (96 U. S. 64), was conclusive here, holding that a contract of loan made by a National bank was valid and could be enforced although violative of the provision of the National Banking Act (U. S. R. S., § 5200), prohibiting a loan to one individual exceeding one-tenth part of the capital of the bank.

(Argued November 30, 1880; decided March 1, 1881.)

THESE are appeals from order of the General Term of the Supreme Court, in the second judicial department, made September 14, 1880, affirming, reversing and modifying certain portions of an order of Special Term.

This action was brought to foreclose a mortgage executed by the defendant, the New York, Housatonic & Northern Railroad Company, to plaintiffs as trustees for bondholders.

A referee was appointed to ascertain the amount due on account of the bonds and the nature and extent of the interest of the bondholders and to report with the evidence. The report of the referee was confirmed with two exceptions.

It appeared that a corporation was organized under the general railroad act in 1863, having the same name as the corporation defendant. Said corporation, in 1868, made its mortgage to plaintiffs as trustees for \$2,500,000. In 1872, said corporation was consolidated with the Southern Westchester Railroad Company into the corporation defendant. In October, 1872, it made a mortgage for \$2,000,000 and exchanged its bonds secured thereby to the amount of about \$183,500, for bonds issued by the old corporation.

The referee found, as to the claims of Louis D. Rucker, that he produced bonds to the amount of \$1,117,000. That \$810,000 of these bonds were issued to said Rucker, as



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security for previous advances made by him to said railroad company, amounting to \$81,000. That \$250,000 of said bonds were issued to the New York Loan and Indemnity Company as collateral security for a loan of \$25,000. That the claim of said New York Loan and Indemnity Company was placed in judgment against the railroad company, and the said judgment was assigned to Rucker for \$12,500. That the ~~balance of said bonds were obtained~~ by Rucker from the Bessemer Company, never having been issued to him or delivered to him by the railroad company, but were taken and held by him as security for certain advances made by him from time to time. It appeared that these advances were made on the joint obligations of the railroad company and the Bessemer Company, which latter company had a contract for the construction of the road of the former. At the time of these advances Rucker was president of the railroad company. The referee held that Rucker was entitled to prove said \$810,000 of bonds only to the extent of his claim of \$81,000 and interest thereon. That he was entitled to prove the bonds assigned to him by the Loan and Indemnity Company only to the extent of the \$12,500 paid by him with interest. That the balance of bonds claimed by him were of no value in his hands and he was not entitled to receive any payment thereon.

The facts in relation to the other claims discussed, so far as they are material, are set forth in the opinion.

*John M. Whiting and Henry W. Johnson* for plaintiffs and others. The railway corporation had full power, under the laws of New York, to borrow money for its corporate purposes and to secure the lenders by a delivery to them of its first mortgage bonds in pledge for the repayment of any loans it might contract. (*Curtis v. Leavitt*, 15 N. Y. 9; *Beers v. Glass Co.*, 14 Barb. 358; *Bradley v. Ballard*, 55 Ill. 413; *Barry v. Mer. Ex. Co.*, 1 Sandf. Ch. 280; *Mead v. Keeler*, 24 Barb. 20; *Coe v. Pennock*, 23 How. 117; *F. L. & T. Co. v. Hendrickson*, 25 Barb. 484; *King v. Mer. Ex. Co.*, 1 Seld. 547; *Leavitt v. Blatchford*, 17 N. Y. 557; 22 id. 494; 26 id.

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410; *Tallmadge v. Pell*, 7 id. 328, 348; *Sackett's H. Bk. v. Codd*, 18 id. 242; *Oneida Bk. v. Ontario Bk.*, 21 id. 490; *Smith v. First Nat. Bk.*, 99 Mass. 605; *Parish v. Wheeler*, 22 N. Y. 494; *Allen v. R. R. Co.*, 11 Ala. [N. S.] 437; *R. R. Co. v. Talmán*, 15 id. 472; *Phillips v. Winslow*, 18 B. Monr. 431; *Bissell v. R. R. Co.*, 22 N. Y. 258; Brice on Ultra Vires [1st ed.]; Angell & A. on Corp. 200; 1 Cow. 513; 21 Pick. 270; 6 Humph. [Tenn.] 515; *Middletown v. Rondout & Oswego R. R. Co.*, 43 How. 481; *South. Life Ins. Co., etc. v. Lanier*, 5 Fla. 110, 165; *Walworth Co. Bk. v. Farmers' L. & T. Co.*, 16 Wis. 629; *Scott v. Johnson*, 5 Bosw. 213; *Barry v. Merchants' Ex. Co.*, 1 Sandf. Ch. 280, 289; 1 Seld. 574; *Curtis v. Leavitt*, 15 N. Y. 9, 62-66; *Smith v. Law*, 21 id. 298; *Belmont v. Erie R. R. Co.*, 52 Barb. 637, 670; *Pusey v. N. J. R. R. Co.*, 14 Abb. Pr. [N. S.] 435; *Butler v. Rham*, 46 Md. 541; *Carpenter v. Blackhawk Mining Co.*, 6 N. Y. 43; *Cent. Gold Mining Co. v. Pratt*, 3 Daly, 263; 2 R. S., 1875, 532, part 1, chap. 18, tit. 15, § 39; Laws of 1850, chap. 140, § 28; *Thompson v. Erie R. R. Co.*, 42 How. Pr. 68; *Hoyt v. Thompson*, 19 N. Y. 207; *Walworth Bk. v. Farmers' L. & T. Co.*, 16 Wis. 629; Angell & A. on Corp. 200; 15 Johns.; 1 Cow.; 21 Pick.; 6 Humph.; *South. Ins. & Trust Co. v. Lanier*, 5 Fla. 110, 165.) Mr. Rucker, while president of the corporation, might lawfully loan to it his moneys for its corporate purposes and take its first mortgage bonds in pledge as security for his repayment to the same extent and in the same manner as any other lender might do. (*Hoyt v. Thompson's Exr.*, 19 N. Y. 207; 5 Abb. [N. S.] 461, 462; 5 Bosw. 178; 26 N. Y. 410; Brice on Ultra Vires [1st ed.], 402; 16 Beav. 485; 10 H. of L. 26; 31 L. J. Ch. 369; *Imp. M. C. Ass'n v. Coleman*, L. R., 6 H. of L. 189; Story on Agency, §§ 351 *et seq.*; *Twin Lick Oil Co. v. Marbury*, 1 Otto [91 U. S.] 587; *Koehler v. Black River F. Iron Co.*, 2 Black, 715; *Drury v. Cross*, 7 Wall. 299; *Luxemburg R. R. Co. v. Maquacy*, 25 Beav. 586; *The Cumb. Coal Co. v. Sherman*, 30 Barb. 553; 16 Md. 456; *Hoyle v. Plattsb., etc.*, 54 N. Y. 314; *Buel v. Buckingham*, 16 Iowa, 284; *Cent. R. R. v. Cleghorn*,

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1 Speers' Eq. 545; *Van Hook v. Somerville R. R. Co.*, 5 N. J. Eq. 137-633; *St. Louis v. Alexander*, 23 Mo. ; *Merrick v. Penn. Coal Co.*, 61 Ill. 492; *So. Baptist Ch. v. Clapp*, 18 Barb. 35; 20 Vt. 425; 13 Metc. 497; 21 Pick. 270; 22 N. Y. 526; *Hoyle v. R. R. Co.*, 54 id. 314; Brice on Ultra Vires, 400, *et seq.*; *Risley v. Ind. R. R. Co.*, 62 N. Y. 247; *Smith v. Lansing*, 22 id. 520; *Barnes v. Brown*, 11 Hun, 315 [Ct. App. MSS. April, 1880]; *Coe v. N. Y. Midland R. R. Co.*, 4 Stewart's Eq. [N. J.] 105, 137; *Chicago Building Soc. v. Crowell*, 65 Ill. 458; *De Groff v. Am. L. T. Co.*, 21 N. Y. 127-8; *Parish v. Wheeler*, 22 id. 503; *Bissell v. M. S. & N. I. R. R. Co.*, id. 258; Story on Agency, §§ 329 *et seq.*; *Mayor v. Ray*, 19 Wall. 468; *Alleghany City v. McClurken*, 14 Penn. St. 81; *Ass. Co. v. Ass. Co.*, 3 Griff. 521; affirmed on appeal, 8 Jur. [N. S.] 628; *Society v. Co.*, 5 De G., M. & G. 465; *Wilson's Case*, L. R., 12 Eq. 521; 7 Chan. 45; *Tallmadge v. Pell*, 7 N. Y. 728, 748; *Sackett's H. Bk. v. Codd*, 18 id. 242; *Onida Bk. v. Ontario Bk.*, 21 id. 490; Dillon on Municipal Corp., § 750; *Matter of German Mining Co., Ex parte Chipendale*, 4 De G., M. & G. 19; *Ex parte Rignold*, 22 Beav. 353; *Lowndes v. Mining Co.*, 33 L. J. Ch. 418; 3 N. R. 601; *Matter of Cork Ry Co.*, L. R., 4 Ch. 748.) A lender of money in good faith, holding bonds as security for his repayment, stands to the extent of his loans as a *bona fide* purchaser of the bonds, and is entitled to the same protection and relief in the enforcement of his rights as if he were a purchaser of the bonds at their full value. (*Brookman v. Metcalf*, 32 N. Y. 591; *Bank v. Hoge*, 35 id. 65; *Platt v. Beebe*, 57 id. 339; *Nelson v. Edwards*, 40 Barb. 279; 42 N. Y. 490; 3 Sandf. 222; 63 Barb. 215-237.) While upon a consolidation of two railway corporations, the legal debts of both become the unquestionable debts of the consolidation, yet that principle has no application to the fraudulent debts of either, and there can be no presumption of validity or of lawful lien in respect of such fraudulent debts, because the consolidated company has seen fit to exchange its bonds for bonds so fraudulently obtained. (*Peterson v. Mayor*, 17 N. Y. 449; 17 Barb. 397;

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*Cumb. Coal Co. v. Sherman*, 30 id. 553.) While the mere default in paying coupons is not of itself a prevention to the transfer of bonds to *bona fide* purchasers, it is a circumstance of suspicion and notice that may, when coupled with other circumstances, destroy such a character in a purchaser. (*First Nat. Bk. St. Paul Co. v. Commissioners*, 14 Minn. 77.) The claimants contesting the claims of Rucker are concluded by the rightful action of the corporation through whom alone they claim. If the corporation is lawfully bound and directly concluded as to Rucker from making any claim against him, the assigns of the corporation are equally estopped, there being no fraud or lack of good faith imputed to the transactions. (*Hoyt v. Quicksilver Mining Co.*, 78 N. Y. 159; *Walworth Co. Bk. v. Farmers' L. & T. Co.*, 16 Wis. 629; *Kelsey v. Nat. Bk.*, 69 Penn. St. 426; Story on Agency, §§ 239, 252, 260.) The suit began in Connecticut, and the proceedings setting off the property of the corporation in that State having been declared null and void, and it being adjudged that nothing was taken by virtue of them, Mr. Rucker's claim, lien and debt against the railroad company and his bonds were not affected or impaired by reason thereof. (2 R. S. [Edm. ed.] 389.) The transaction with the National City Bank of Brooklyn being illegal, gives to the bank no higher or more perfect right to the bonds than Mead himself has. (*Barton v. Plank R. Co.*, 17 Barb. 397.) It was the duty of the president of the bank to satisfy himself as to the bonds, with the degree of notice that he had; and, not having done so, he stands in submission to the fact, whatever it might be. (Wade on Notice, §§ 37-39; *Story v. Arden*, 1 Johns. Ch. 261; *Birdsall v. Russell*, 29 N. Y. 220.) There is in the General Railroad Act no prohibition against the corporations created thereby contracting legitimate debts in the ordinary course of their business, and mere indiscreet management will not be ground for interference by a court called on to review a corporation's acts. (*Bk. of U. S. v. Dandridge*, 12 Wheat. 113; 1 Sandf. Ch. 280; *Smith v. Law*, 12 N. Y. 296, 299; 15 id. 62, 220, 266, 268; Laws of 1850, chap. 140,

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§ 6.) In the absence of a statutory prohibition, a corporation can deal precisely as an individual can. (*Mott v. Hicks*, 1 Cow. 513; *Curtis v. Leavitt*, 15 N. Y. 64, 66.) The fact that Mr. Kirkland was an officer of the company at the time he took the security does not vary his rights so long as his debt was a just one, untainted with fraud, and so long as he secured no undue advantage to himself as against other persons interested in the property of the corporation. (*Coe v. Pennock*, 23 How. 117; *F. L. & T. Co. v. Hendrickson*, 25 Barb. 484; *King v. Mer. Ex. Co.*, 1 Seld. 547; *Leavitt v. Blatchford*, 17 N. Y. 557; *Parish v. Wheeler*, 23 id. 494; *Nelson v. Eaton*, 26 id. 410; *Hoyt v. Thompson's Ex'r*, 19 id. 207.) The delivery of the bonds to Kirkland being open and above board, and the deliberate act of the board of directors, the representatives of the corporation, and its lawful statutory managers, must be sustained. (*Bk. of U. S. v. Dandridge*, 12 Wheat. 113.) Under these circumstances no other purchaser or holder of bonds can complain. (*Caylus v. Kingston, etc., R. R. Co.*, 10 Hun, 295; 76 N. Y. 609.) Until an offer of payment and redemption is made, and its refusal is shown, the holder of the pledge holds it for its value, and retains all his rights. (*Bruen v. Hone*, 2 Barb. 586; *Wood v. Oakley*, 11 Paige, 400; *Carnes v. Platt*, 59 N. Y. 405; *Mumford v. Am. L. Ins. & T. Co.*, 4 id. 482-3; *McDonald v. Neilson*, 2 Cow. 139.)

*Jesse Johnson and E. Ellery Anderson* for National City Bank of Brooklyn and others. There was no authority in the trustees or the company to use bonds issued under the mortgage to the trustees to pay debts incurred prior to and not released or affected by its issue. If such authority existed it could not be exercised to the prejudice of *bona fide* purchasers of the bonds. (3 Edm. Stat. at Large, 628, § 28, subd. 10; *Seymour v. Canandaigua R. R.*, 25 Barb. 284; 14 How. Pr. 531; 7 Edm. Stat. at Large, 337; chap. 779, Laws of 1868; *Cumberland Coal Co. v. Sherman*, 30 Barb. 565, 567; *Gardner v. Ogden*, 22 N. Y. 343; *Butts v. Wood*, 37 id. 317; *Coleman v. Second Avenue R. R. Co.*, 38 id. 201; *James v. Cowing*,

17 Hun, 256; *Barnes v. Brown*, 11 id. 315.) Mead had such a possession and indicia of title that he could, as toward a person acting in good faith, give a good and available title. (*Barnard v. N. Y. & H. R. R. Co.*, 25 N. Y. 496.) Whatever the title of Mead or the bank may have been in the old bonds, it is now perfect and absolute in these bonds. (*Coal Co. v. Sherman*, 30 Barb. 563.) Every holder in good faith and for value of the bonds of a corporation is entitled to recover their full amount against the maker. (*Cromwell v. Co. of Sac*, 96 U. S. 51-60.) The fact that the loan made to the maker was less than the face of the bonds does not affect or diminish the right of the holder, except that it limits his recovery to the amount of the loan and interest. (*Hodge's Appeal*, 84 Penn. St. 359.)

FINCH, J. It is not possible, in this case, to go much beyond a brief statement of our conclusions. To discuss all the questions raised by the numerous appeals, through their voluminous and complicated details, would prolong an opinion beyond what is either necessary or profitable.

We have reached the conclusion that the appellant, Rucker, should be allowed to prove in full all of the \$810,000 of bonds, which he holds as a pledge, to secure the debt due him from the railroad company of \$81,000 and interest, and which he can produce for that purpose; and is entitled to share in the distribution upon that basis to the extent of such indebtedness. It is not intended to deny, or question the rule that whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary, being intrusted by others with powers which are to be exercised for the common and general interests of the corporation, and not for his own private interests, and that he falls, therefore, within the doctrine by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involving such confidence.

(*Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 328; *Gardner v. Ogden*, 22 id. 327; *Twin Lick Oil Co. v. Marbury*, 1 Otto, 587; *Smith v. Lansing*, 22 N. Y. 531; *Aberdeen Railway Co. v. Blaikie Bros.*, 1 Macq. 461, per Lord CRANWORTH.) Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character. (*Davoue v. Fanning*, 2 Johns. Ch. 260.) But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent. Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. (*York Co. v. McKenzie*, 8 B. Par. Cas. 42.) To cling to the fruits of the trustee's dealing while seeking to avoid his act; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection, into a weapon, of offense and injustice. And where the trustee's act consists, not in possessing himself of the property of the beneficiary as owner, but in taking collateral security for a debt honestly due him, or a liability justly incurred, the rule can have no application, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance. And this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be regarded equally exists. It is upon this ground that the case of *Smith v. Lansing* (22 N. Y. 520) stands. The collateral taken there was after the creation of the liability, and we held the transaction valid. The ground of the decision was distinctly stated to be that the association had received the direct benefit of the several amounts of money

to secure which the bonds were given, and the creditors had indirectly received the benefits of the same by the consequent increase of the assets; and that, upon the application of the beneficiary or its receiver, the trustee should be permitted to set up any equities which existed, entitling him to retain the property, either absolutely or as security for the moneys advanced or liabilities incurred. Since, therefore, in the case of a pledge delivered as security for a just and honest debt, the principal may always redeem upon payment, and the rule of equity is in no respect different, we do not see that it has any application, or can in any respect modify the legal relation of the parties.

The pledge of Rucker and its validity is, however, attacked from another and a different direction. It is argued that the right to make the mortgage under which the bonds were issued is given by the statute (Laws of 1850, chap. 140, § 28, subd. 10), and is limited to an authority, "from time to time, to borrow such sums of money as may be necessary for completing and finishing, or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid." It is then argued that the railroad corporation had no right to pledge its bonds as security for a precedent debt, as was done in the present case. But if the precedent debt was contracted in the process of borrowing money for the construction or operation of the railroad, we do not see that the purpose of the statute is at all violated or avoided. Its terms do not require that the borrowing and the issuing of the bonds should be simultaneous acts. The former may naturally and properly precede the latter. In the present case there is neither proof nor intimation that the loan of Rucker was for a purpose outside of the statute, but on the contrary all the facts indicate that the money he advanced went actually into the construction of the road.

We conclude, therefore, that he is entitled to prove so many of the \$810,000 of bonds as he holds, and can produce as



pledgee, and share in the distribution accordingly up to the amount of his debt.

It was error to reject the bonds held by Rucker as the assignee of the Loan and Indemnity Company, and those which he received as a pledge from the Bessemer Company. The transactions relating to these bonds occurred after he had ceased to be an officer of the railroad company, and when he occupied toward it no relation of trust or confidence which could, on any theory, expose his action to scrutiny or criticism.

He dealt, therefore, like any other stranger, and is entitled to prove such of these bonds as he holds as pledgee and can produce for that purpose, and receive the dividends thereon to the amount of the debts respectively which the bonds were pledged to secure. The objection made to the title of the Loan and Indemnity Company that it violated the law in discounting the note of \$25,000, and so the pledge falls with it (R. S. part 1, tit. 20, chap. 20, §§ 1 and 5), is answered by a reference to the charter of the company (Laws of 1870, p. 1803), which authorized it to "advance moneys, securities and credit upon any property, real or personal," and by our recent decisions, that, even if the note discounted was void, the loan and its security were valid, and capable of being enforced. (*Pratt v. Short*, 79 N. Y. 437; *Pratt v. Eaton*, id. 449.)

We see no reason to disturb the conclusion arrived at by the referee and affirmed by the General Term as to the bonds of Henry W. Johnson, amounting to \$40,500. His ownership is assailed by Rucker, who claims that he lacks forty-two bonds of those originally pledged to him, and that they now appear in Johnson's possession. The latter received them from one Ball, who was a contractor, and who got them from the railroad company in settlement of his account. As Rucker, at one time, surrendered his pledged bonds, and devoted them to the construction of the road, so that it was possible for Ball to receive them rightfully, we do not see that the title of Johnson is imperfect, or that Rucker has established any paramount claim.

Artemas S. Cady was found by the referee to be the owner of \$31,000 of the bonds, and the pledgee of \$34,000 more, which last were held as collateral to a loan of \$5,000 and interest. The loan was through the Bessemer Company, to whom the bonds had been promised upon their contract for construction. The referee allowed the bonds owned to be proved in full, and those held in pledge also in full, but limiting the dividend thereon to the amount of the loan and interest.

Inadequacy of consideration, and an alleged inability of a railroad corporation to apply its bonds by way of pledge, at least as security for a precedent debt, were the only grounds of objection urged. We do not think they are sound. Since Cady was neither officer nor director, and owed no duty by virtue of such relation to either the Bessemer Company or the railroad, he had unquestionably the right to take as large a "margin" for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale, and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing. We agree, therefore, as to these bonds with the conclusion of the referee.

Charles D. Bailey bought \$10,000 of the bonds of the old company from E. F. Mead, who was, at the time, one of its directors. After the consolidation Bailey was allowed, upon the surrender of his old bonds, to receive an equivalent amount of the new ones. It is objected that Mead bought these bonds of his company at fifty-one cents on the dollar, which is probably true; that being a director he could not thus buy below par except at the peril of avoidance by the courts upon the application of the corporation, which must be conceded (*Cumberland Coal Co. v. Sherman*, 30 Barb. 565; *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Second Ave. R. R.*, 38 id. 201); that his title was, there-

fore, defective, which, as between himself and the company, may be granted; and that Bailey, being also a director, was not protected in his purchase. The difficulty is an utter absence of proof as to the last material fact. We do not know the date of Bailey's purchase. It may have been before he was elected director. If so, there was nothing to affect his position as a purchaser for value and in good faith, unless the fact that he knew Mead to be a director was enough to put him on inquiry and charge him with constructive notice of the defect in the title. We cannot so decide. A director may be the lawful and honest holder of the bonds of his company. There is no presumption to the contrary. The fact is not even just ground of suspicion. The referee, therefore, properly allowed the \$10,000 of bonds to be proved in full. As to the remaining \$1,500, our conclusion is different. They were plainly a bonus, taken by Bailey, while a director, on his stock subscription, and for which he paid nothing. His attempted reversal of the process is wholly ineffectual in the face of the proved action of the company authorizing the bonds to be given as a bonus, instead of the stock. We cannot sustain this transaction. Very likely the stock was worthless, but that does not palliate or excuse the proceeding. It is true the bonds were exchanged for those of the new company, and that fact is relied upon to make him a holder for value, and as a ratification by the company. But either view is answered by the fact that he was a director when the exchange was authorized and when it was made. He had the power and the opportunity to aid in an effort to ratify his previous wrong, while his obvious duty as an official was exactly the reverse. He had full knowledge of all the facts and did not act in good faith. The \$1,500 of bonds, therefore, cannot be proved.

These views involve in the same fate the bonds of both Hall and Benedict. They each received their bonds as a bonus while they were directors of the company, and remained such when the new bonds were made and authorized to be exchanged. It is said in the opinion of the General Term that the bonds of Hall were not disputed. That is a mistake.

Their allowance by the referee was expressly excepted to on behalf of Rucker.

The bonds of Austin Stevens were properly allowed to be proved. He bought them of Duncomb who was a director, and whom he knew to be such, but did not know how Duncomb obtained them, or of any defect in his title.

Those of Daniel H. Temple for \$5,000 were allowed by the referee, but rejected by the General Term. They were taken by him of Duncomb in pledge for a precedent debt. As a consequence he cannot be deemed a holder for value, and must be held to have taken no better title than that of his pledgor. (*Taft v. Chapman*, 50 N. Y. 445; *Coddington v. Bay*, 20 Johns. 645; *Stalker v. McDonald*, 6 Hill, 93; *Weaver v. Barden*, 49 N. Y. 286.) The title of Duncomb was vulnerable. He got his original bonds from the company, partly for alleged salary, partly at fifty-one cents on the dollar, and partly as a bonus for stock subscription. He was a director in the old company while thus obtaining the bonds and a director in the new company when the exchange of securities was made. His title, therefore, was bad and that of his pledgee must fall with it.

As to the bonds of Joshua C. Saunders, there appears to be no doubt that he was the actual owner and holder of \$6,000 of them. The referee so finds, and the evidence warrants his conclusion. The balance of \$21,000 were held by him as collateral to a note of \$1,000. Pending the inquiry before the referee the pledge was foreclosed by a sale at auction, and Saunders testifies that through such sale he became the owner. His testimony is, "these bonds I now own by sale under the power given in the note under which they were hypothecated." That is all we know about it. What the terms of the note were; whether before sale there was a demand of payment and opportunity to redeem (*Milliken v. Dehon*, 27 N. Y. 364; *Lawrence v. Maxwell*, 53 id. 19); whether the sale was on notice or not, and who became the purchaser, we are left to imagine. We are, perhaps, bound to assume from what is shown that he bought them in at the sale. He does not

assert any other or different title. If so, he must still be treated as pledgee since he had no right to buy. (*Bryan v. Baldwin*, 52 N. Y. 232.) The referee correctly decided that these bonds held as collateral could be proved in full, but the dividend payable upon them should be limited to the amount of the debt. The pledge appears to have been for present advances, so that Saunders was a holder for value. (*Durbrow v. McDonald*, 5 Bosw. 130; *Winne v. McDonald*, 39 N. Y. 233; *McNeil v. Tenth National Bank*, 46 id. 325.) The modification by the General Term which tended to destroy his margin was erroneous.

In the case of the National City Bank we think the referee was wrong, and the modification made by the General Term was also erroneous. The bank loaned \$35,000 to George W. Mead, who at the time was a director in the railroad corporation, and known to be such, taking \$70,000 of the bonds as collateral. There is no proof that the bank or any of its officers had any knowledge of a defect in his title. That they knew him to be a director was not enough, as we have already said, to put them on inquiry. It is further claimed, however, that the bank, having a capital of \$300,000, violated the law in making this loan to Mead of \$35,000. (National Banking Act, §§ 5200, 5239, U. S. Stats.) The penalty of such violation is fixed by the act itself, and consists in proceedings against the franchise of the bank, and a liability for damages of the offending officers. As to this question, which arises under the Federal law, and respects corporations created by its authority, we must follow the rulings of the Federal courts, and those determine very clearly that the contract of loan was not invalid but may be enforced. (*Gold-Mining Co. v. National Bank*, 96 U. S. 640.)

As to the claim of John J. Studwell for \$70,000 of bonds, we must be guided by the findings of the referee, that Studwell, by assignment from Cornell, the Park Bank and The National Citizens' Bank, acquired their rights to the debts held by them respectively, and the bonds pledged as collateral. His title as pledgee, derived from these sources, has not been

successfully attacked; and the referee, instead of limiting him to the proof of bonds equal to the debts secured, should have allowed him to prove all the bonds and receive a dividend thereon to an amount not exceeding the amount of the debts for which they were held as collateral.

The claim of the East River National Bank should be corrected in the same way. It should be allowed to prove all its bonds and share in the distribution to the amount of the debt for which it holds them as security.

The bonds of Eliza Hatfield, held by her to the amount of \$20,000, were allowed by the referee to the extent of \$2,137, and no more. This was the amount found due upon the debt for which the bonds were held as collateral. The referee's finding was corrected at Special Term, in accordance with the exception filed on the claimant's behalf, and it was determined that she held \$13,000 of the bonds as collateral, and should be entitled to receive their proper dividend up to the sum of \$2,352.65, and owned \$8,000 of said bonds absolutely. There is evidently still an error, for the two sums make \$21,000 of bonds instead of \$20,000, which was the whole amount. On examining the exception, which was allowed by the Special Term, it is evident that the collateral bonds were 1,087 to 1,098, both inclusive, or \$12,000 instead of \$13,000. On this claim, therefore, the \$8,000 of bonds should be proved in full, and also the remaining \$12,000; but on these last no dividend should be paid beyond the sum of \$2,352.65.

The bonds of George W. Mead, to the amount of \$19,500, were disallowed by the referee, but allowed by the General Term, at the amounts said to have been actually paid by him. The evidence leads us to prefer the conclusion of the referee. It is extremely doubtful whether Mead paid any thing whatever for the bonds. His position as director, and the manner in which he sought to use it for his own benefit, make it very clearly our duty to avoid the whole transaction and affirm the conclusion of the referee.

As to the Grocers' Bank, it is conceded by the counsel for

the receiver that we can do no more than affirm the conclusion of the General Term.

The claim of William R. Kirkland was rejected both by the referee and the General Term. He was elected president of the railroad company in 1873 and his salary fixed by a resolution of the board of directors at \$5,000 per annum. The company failed to pay and gave him its notes for \$3,500 and \$7,000 of the mortgage bonds as collateral. The salary was honestly due. It was a just debt against the company. The latter has no possible ground of defense against it. Why might not such a debt, fairly and honestly incurred, in the absence of means of payment, be secured by the pledge of the bonds? Grant that the creditor's official position should awake scrutiny and sharpen criticism. Yet the right of the officer to fair compensation which has been honestly earned is as clear as that of a stranger. His services were as necessary to the construction of the road as those of the laborer who laid the rails. The president took the bonds merely in pledge. The right of redemption remained. The company could at any time have repossessed its bonds upon the condition, surely equitable, of paying the debt it owed. No undue or improper advantage was obtained. We are of opinion, therefore, that Kirkland is entitled to prove his bonds, and share in the distribution on that basis.

The Seaman's Bank for Savings also appeals from the order which excludes it from the benefit of \$2,000 of bonds held as collateral. It appears that the company was indebted to the bank for rent, and these bonds were turned out as security. The bank had the right to demand and receive them. No possible ground of objection occurs to us except an assertion that such use of the bonds was not justified by the lawful purposes of their issue, and the perversion was of course known to the pledgee. But such a construction would be altogether too rigid and narrow. A business office was essential and necessary and fairly embraced within the authority to issue bonds for the purpose of building, operating and maintaining a railroad. It was a necessary and indispensable aid to the end sought to be ac-

complished. As the bank was merely a creditor, it had the right to insist upon security for its rent, and having received a pledge of the bonds to hold them, and prove them to their full amount, and receive a dividend thereon, not exceeding the amount of their debt.

We are satisfied with the conclusion reached as to the bonds of Mordecai M. Smith. As to \$9,000 of them he was found to be purchaser and owner and permitted to prove them as such. As to the larger amount, all parties seem to concur in treating the alleged title of Wiley, obtained upon a sale of the collateral at auction, as not affecting results. To give it effective force in the absence of definite proof as to its regularity and propriety, and under the circumstances of suspicion which surround it, would hardly be justifiable; and since all his rights were assigned to the parties for whom he evidently acted, it is proper to dismiss it from consideration, and treat the case as if he had not intervened. The firm of Mead & Clark made certain advances to the railroad company upon the faith of these bonds pledged with them as collateral security. Since both were directors the transaction, even if open to criticism, and liable to avoidance, was modified by the further fact that the bonds were pledged for actual advances, and therefore the avoidance could only be made upon condition of the repayment of the advances. Mead & Clark could assign to Smith their debt due from the company and the collateral with it, though not as their own property or in derogation of the rights of the original pledgor. (*Nash v. Mosher*, 19 Wend 431; *White v. Platt*, 5 Den. 269; *Hays v. Riddle*, 1 Sandf. 248; *Lewis v. Mott*, 36 N. Y. 395.) By the assignment to Smith he acquired the rights of Mead & Clark to the extent of their advances, and was properly allowed to prove his bonds as security for that amount.

We should modify the orders of the Special and General Terms to correspond with these views if the facts before us would admit of so doing with absolute accuracy; but as we cannot say what bonds may or may not be produced and proved under our rulings we reverse the orders of the Special and Gen-



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eral Terms and remand the case to the Special Term for a further hearing, costs to be adjusted below.

All concur.

Ordered accordingly.

MORRIS FRANK et al., Respondents, v. THE CHEMICAL NATIONAL BANK OF NEW YORK, Appellant.

When forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud, at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger.

Where, therefore, checks forged by plaintiffs' confidential clerk, who filled out their checks and had charge of their bank account, were paid by defendant, charged to plaintiffs in their pass-book, the book balanced and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the pass-book was written up and vouchers returned, and the clerk by abstracting the forged vouchers and by false balances and readings, prevented the forgeries from being discovered. *Held*, that plaintiffs were not estopped from questioning the accuracy of the account; and that defendant was liable for the balance, deducting the forged checks.

(Argued December 7, 1880; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of November, 1879, affirming a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 13 J. & S. 452.)

This action was brought by plaintiffs who composed the firm of Frank & Hirsh, to recover a balance alleged to be due upon their deposit account with defendant. The facts appear sufficiently in the opinion.

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*Charles Jones* for appellant. If it be assumed that a depositor in a bank owes no duty to the bank which requires him to examine his pass-book or vouchers with a view to the detection of forgeries, still he is not free from all duties to the bank, nor are his acts without effect upon the relations of the parties. (*Weisser's Administrators v. Denison, President*, 10 N. Y. 68; *Welsh v. The German-Am. Bk.*, 73 id. 421.) The relation of a bank and its depositors is simply that of debtor and creditor. (*Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82.) Between debtors and creditors the account may, by the acts of the parties, become an account stated, and the same principles which govern such an account between persons apply to a bank and its depositor. (*Hutchinson v. The Market Bk. of Troy*, 48 Barb. 302; *Lockwood v. Thorne*, 11 N. Y. 170.) An estoppel *in pais* is established when it is shown that the person sought to be estopped has made an admission or done an act that he had reason to believe would influence the conduct of another, or which a sensible man would take to be true and believe that it was meant he should act upon it; that the other party has acted upon it, or was influenced by such act or declaration, and that the other party will be prejudiced by allowing the truth of the admission or act to be disproved. (*Bowen v. Bowen*, 30 N. Y. 519, 541; *Continental Nat. Bk. v. Nat. Bk. of Comm.*, 50 id. 575; *Manf. & T. Bk. v. Morris Hazard*, 30 id. 226; 30 id. 226; *Blair v. Wait*, 69 id. 113.) It is not necessary to show that a demand from plaintiff's clerk or a suit against him would have resulted in the recovery of the money. (*Voorhis v. Olmstead*, 66 N. Y. 113, 118; *Knights v. Wiffen*, L. R., 5 Q. B. 660; Bigelow on Estoppel, 497; *Cont. Nat. Bk. v. Nat. Bk. of Comm.*, 50 N. Y. 575.) As between plaintiffs and defendant if Goodheim did any wrong acts the plaintiffs, who put it in his power to injure defendant, should be the persons to suffer by his wrongful acts. (*Griswold v. Haven*, 25 N. Y. 575.)

*B. F. Watson* for respondents. Assuming this to be the case of two innocent parties, it is settled law that the bank must suffer for the payment upon forged signatures, unless the plaintiff-

iff was guilty of gross carelessness. (*Leavitt, Prest., etc., v. Stanton, Prest., etc.*, Hill & Den. Supp. 963; *Weisser v. Denison*, 10 N. Y. 68; *Frank et al. v. The Chemical Bank*, 37 N. Y. Sup. Ct. 27; *Bank of Commerce v. Union Bank*, 3 Comst. 230; *Goddard v. Merch. Bank*, 4 id. 147.) A settled account may be impeached by proof of unfairness or mistake in law or fact. (*Manhattan Co. v. Lydig*, 4 Johns. 377; *Sherman v. Sherman*, 2 Vern. 276; *Philips v. Belden*, 1 Edw. Ch. 1; *Kinsman v. Barker*, 14 Ves. 579; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Baron v. Rhinelanders*, 1 Johns. Ch. 550; *Perkins v. Hart*, 11 Wheat. 237; 1 Story's Eq. Jur., §§ 523, 528, 529; *Hall v. Hase*, 10 Mass. 40; *Salem Bank v. Gloucester*, 17 id. 1.) If it be conceded that the three or four settlements of the deposit book and returning the vouchers amounted to an account stated between the parties, yet the effect is merely to cast the burden of proof upon the plaintiff to show errors or mistakes in the accounts. (*Weisser v. Denison*, 10 N. Y. 68; *Lockwood v. Thorne*, 11 id. 170.) The principle that notice to an agent is notice to the principal is only applicable to cases in which the agent is acting in the course of his employment. (*Foster v. Essex Bank*, 17 Mass. 478; *Lewis v. Read*, 13 Mees. & Wels. 834; *Lyons v. Martin*, 8 Adol. & Ellis, 512; *Schmidt v. Blood*, 9 Wend. 268; *Vanderbilt v. Richmond Turnp. Co.*, 2 Comst. 479.)

ANDREWS, J. The plaintiffs' firm were depositors with the defendant, and between the 13th of July, 1869, and the 26th of September, 1870, their deposits, together with the balance to their credit at the former date, amounted to \$335,597.67, and during the same period the defendant paid out upon their checks \$323,914.01. The defendant has since paid the plaintiffs \$3,502.08, leaving a balance of \$8,181.58 remaining due from the defendant, unless the plaintiffs are chargeable with thirty-seven forged checks, purporting to have been drawn by them at various dates between July 13, 1869, and September 26, 1870, paid by the bank and charged to their account, amounting in the aggregate to that sum.

The plaintiffs were merchants doing business in the city of New York, under the name of Frank & Hirsch, and the evidence tends to show that the forgeries were committed by one Goodheim, their book-keeper. The firm kept a check book, in the margin of which all checks drawn by the firm were entered. The checks were filled up by Goodheim, but in all cases genuine checks were signed by one of the plaintiffs. Goodheim had charge of the bank account. The plaintiffs had a pass-book, in which the bank entered the deposits, and every quarter-day, or soon thereafter, the pass-book was delivered by the plaintiffs to the bank, for the purpose of having their checks entered therein and a balance struck. This was done on four occasions subsequent to July 13, 1869, and the bank on each occasion entered separately in the pass book the amount of each check paid, including the forged checks, and struck a balance and then returned the pass-book with the vouchers to the plaintiffs. But in all this matter, Goodheim acted for the plaintiffs. He delivered the book to the bank and received it again after it was written up, with the vouchers. The plaintiffs, on each occasion after the pass-book had been written up and the vouchers returned, made an examination of the account, by comparing the checks returned to them by Goodheim with the memorandum of checks in the margin of the check-book, and the balance in the pass-book, with the balance appearing in the check-book, and on each occasion they were found to correspond. The plaintiff Frank then compared the checks with the entries in the pass-book, by having Goodheim read the entries while he had the checks, and no discrepancy appearing, the account was deemed to be correct and was not further examined. It very clearly appears that Goodheim, by abstraction of the forged vouchers and by false balances and readings, deceived the plaintiffs and prevented them from ascertaining, by means of the examination as conducted by them, the true state of the account and the fact of the forgeries. Goodheim absconded in September, 1870, and soon afterward the plaintiffs discovered three of the forged checks among the checks then in possession of the bank. This

led to further examination and the discovery of the other forgeries. Thirty-four of the checks charged in the account of the bank, claimed to be forged, which had been returned by the bank, were not found or produced on the trial. The inference from the evidence is, that they had been carried away or destroyed by Goodheim.

The recovery by the plaintiffs is sustained by the decision in *Weisser's Adm'rs v. Denison* (10 N. Y. 68). It is unnecessary to restate at length the grounds of that decision, which are fully set forth in the opinion delivered in that case. The principle that a bank cannot pay out the money of a depositor on forged checks and debit them to his account is clear enough. It is equally clear that it makes no difference that the forgery was committed by a confidential clerk of the depositor, who by his position had unusual facilities for perpetrating the fraud and imposing the forged paper upon the bank. It is, however, strenuously contended by the learned counsel for the defendant that where, as in this case, a pass-book is kept, which is balanced from time to time and returned to the depositor with the vouchers for the charges made by the bank, including forged checks, the latter is under a duty to the bank to examine the account and vouchers, with a view to ascertain whether the account is correct. It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank, which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the

forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks, it commits the first fault. It cannot visit the consequences upon the innocent depositor, who after the fact, is also deceived by the simulated paper. So if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty, at most, only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger. In this case Goodheim was the criminal. His position enabled him to deceive the plaintiffs as well as the bank, and to postpone the detection of his frauds. The plaintiffs seem to have taken unusual care in the examination of the bank account. It was only because Goodheim was the criminal, that the examination did not disclose to them the forgeries. He was not the plaintiffs' agent in issuing the forged paper, nor was he their agent in abstracting the false vouchers and falsifying the books, which was done in aid of his criminal purpose. The plaintiffs did nothing to deceive the defendant, nor, so far as appears, did they omit to do any thing which ordinary prudence required. The bank, in paying the successive checks, did not act upon the fact that a previous forged check has passed the plaintiffs' scrutiny unchallenged. In each case the bank paid the check presented because upon inspection it supposed it to be genuine. If the forged checks first returned had been immediately ascertained to be forgeries, it might and probably would have prevented the subsequent forgeries. But the failure to detect them was not the reason of the subsequent payments by the bank. We are of opinion

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that upon the facts found there is no estoppel. The loss must fall upon one of the parties, and it must, we think, be borne by the bank.

There are some exceptions to evidence. So far as they were considered in the opinion below, they are satisfactorily answered. We find none which would justify a reversal of the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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THE TRUSTEES OF THE FREEHOLDERS AND COMMONALTY OF  
THE TOWN OF EAST HAMPTON, Appellants, v. JOSIAH KIRK,  
Respondent.

Plaintiffs having title to land bounded by the waters of a bay at ordinary high-water mark made an allotment, under which defendant claimed, bounded westerly by "the cliff" At the time of the allotment there was a strip of land between the cliff and high-water mark. In an action of ejectment, *held*, that this strip was not embraced in the allotment; but that the boundary by the cliff was not a shifting one so as to entitle plaintiffs to make reprisals out of the allotted lands for land lost by the advance of the sea; and that, as between them and the grantees, the site of the cliff at the time of the allotment continued to be the western boundary, and if the strip then intervening between it and high-water mark and a portion of the cliff had subsequently been worn away by the action of the sea, so that the present high-water mark was within the boundaries of the allotted land, plaintiffs had no title.

Defendant also claimed by adverse possession. It appeared that fences on the sides of defendant's premises, extending across the strip in question to or near low-water mark, had been maintained by him and his grantors for more than twenty years, those portions across the beach being taken away in winter to prevent their being carried away by the ice and tides; there was no fence along the cliff, the land on that side being open to the sea. *Held*, that the evidence was sufficient to authorize the submission to the jury of the question as to whether there was a substantial inclosure within the meaning of the statute.

Also *held*, that the fact that defendant and his predecessors in title had gathered sea-weed from the premises while not alone evidence of adverse possession, was such evidence taken in connection with the fact that

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they claimed to prevent other freeholders of the town from gathering, and that they did so under claim of exclusive right as owners, which claim was known to plaintiffs.

It appeared that R., a former owner of defendant's land, brought an action for trespass against one who had gathered sea-weed upon the beach. R. discontinued the action under an agreement with the town and agreed not to sue again. *Held*, that this did not entitle plaintiffs to a charge to the jury that R. thereby relinquished his adverse possession; that it was at most evidence bearing upon that question for the consideration of the jury.

(Argued December 20, 1880; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 10, 1878, which affirmed a judgment in favor of defendants, entered upon a verdict and affirmed an order denying a motion for a new trial.

This was an action to recover possession of a strip of land called "the beath," lying along the front, upon the bay, of defendant's land, in the town of East Hampton, Suffolk county, and between high-water mark and the "cliff" or upland.

The case is reported upon a former appeal in 68 N. Y. 459.

Plaintiffs claimed title under what is known as "Dongan's Patent," issued by Governor Dongan in 1686 to plaintiffs in trust for the use of the inhabitants of the town. The lands were allotted to various inhabitants of the town, being bounded "westerly by ye cleft." Plaintiff claimed under a deed executed in 1810, which bounded the land on the bay side "by the cleft or beach," and through various mesne conveyances wherein the boundary was similar, in some the word being "cliff," in others "cleft."

The further material facts appear in the opinion.

*J. Lawrence Smith* for appellants. The cliff which formed the north-west boundary of the allotment in 1736 was a movable boundary, if its location has been materially changed since the allotment, so that the north-west boundary of the lots is the site of the cliff as it is now located. (*Kind v. Lord Yar-*



Opinion of the Court, per ANDREWS, J.

*borough*, 3 Barn. & Cress. 91; 6 Cow. 536, note *a*; Hale's *De Jure Maris*, chap. 1; 3 Kent's Com. 428, note *a*; 1 Gill & Johns. 249; *New Orleans v. The United States*, 10 Pet. 662; *Municipality v. Orleans*, 18 La. 122, 436; *Phillips v. Rhodes*, 7 Pick. 322; Angell on Water-Courses, §§ 53, 54a and notes; 2 Justinian's Institutes, tit. 1, §§ 20, 21; *Matter of Hull & Selby R. R. Co.*, 5 Mees. & Wels. 327.) To make fences effective as evidence of adverse possession they must be made to guard the premises against escape from within or encroachment without. (*Jackson v. Schoonmaker*, 2 Johns. 230, 234.) The obvious and undoubted comity of permitting fences to be maintained, under the circumstances, is a complete bar to the pretense that the fence was ever put there to the exclusion of anybody using or traveling on the beach. (*Flora v. Carbean*, 38 N. Y. 111, 116; *White v. Spencer*, 14 id. 247; *Calvin v. Burnett*, 17 Wend. 564.) The taking of sea-weed from the beach by the defendant and his grantors could not be an act of adverse possession, because they had a perfect right to do it as citizens and commoners of East Hampton. (*Trustees of East Hampton v. Kirk*, 68 N. Y. 459.)

*E. A. Carpenter* for respondent. The title to the property in question is not and never was in the plaintiffs. (R. S., part 2, chap. 1, tit. 1, art. 2, § 46.) If the cliff was the westerly or north-westerly boundary of the allotment in 1736, it was a fixed not a movable boundary, and the defendant is entitled to go exactly where the cliff stood at the time of the allotment and the date of his deed. (2 Bl. Com. 262; *Matter of the Hull & Selby Ry. Co.*, 5 Mees. & Wels. 237; *Rex v. Yarrowborough*, 3 Barn. & Cress. 91; Angell on Tide-waters, 249; *Souset v. Shepherd*, 4 Wall. 502; *Barrett v. New Orleans*, 13 La. Ann. 105.)

ANDREWS, J. In the allotment by the trustees of the freeholders and commonalty of the town of East Hampton of the common lands of the town, made in 1736, the Mulford tract, now owned by the defendant, was described as bounded westerly

by the cliff. It is assumed by both parties that the title of the freeholders under the Dongan patent extended to ordinary high-water mark. When the allotment was made, there was a strip of land between the cliff and high-water mark several rods in width. This strip was not embraced in the allotment, and was consequently reserved by the freeholders as a part of the common lands. The plaintiffs as owners held it subject to the incidents which attend the title of riparian owners. They would be entitled to whatever should be gained from the sea by alluvion or dereliction, and their title was liable to be lost by the advance of high-water mark, so as to bring the strip reserved within the ebb and flow of the tide. (2 Bl. Com. 262; *In re Hull and Selby Ry.*, 5 Mees. & Wels. 327.) There was the possibility of gain or loss, to which all riparian owners are subject.

The defendant introduced evidence tending to show that since the allotment the cliff had been worn away by the action of the sea, and that the space between the cliff as it now exists and present high-water mark was, at the time of the allotment, within the boundaries of the allotted land. If this fact is established, it necessarily follows that the strip reserved by the freeholders from the allotment has been swallowed up by the sea, and the plaintiffs have no title to the *locus in quo*, unless, as they claim, their boundary was carried eastward *pari passu* with the advance of the sea. It is insisted, in support of this position, that the cliff, under the description in the allotment, was a movable boundary. There may be a movable freehold, as when the crown grants to a subject the soil between high and low-water mark. In that case the grant would be construed according to the presumed intention to convey the shore, wherever, from time to time, it might be; and the same construction has been put upon a grant by a subject in whom the title to the shore was vested. (*Scrutton v. Brown*, 4 Barn. & Cress. 485.) So also where an easement is granted to take sea-weed from the beach of the grantor, the right would be held ordinarily to follow the shifting of the beach, occasioned by the imperceptible encroachment or reliction of the sea.

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Opinion of the Court, per ANDREWS, J.

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(*Phillips v. Rhodes*, 7 Metc. 322.) But the allotted lands were not bounded by the shore, but by the cliff. The cliff was a visible monument; and there is nothing in the attending circumstances to show that the parties to the allotment apprehended that the shore line would be materially changed. The freeholders may have intended, by bounding the allotted lands by the cliff, to secure to the public in perpetuity the right of access to the sea, but there is nothing to indicate that this was intended to be accomplished in any other way than by reserving from the grant the strip then lying between the cliff and the shore. It would, we think, be an unwarrantable interpretation of the transaction to hold that the cliff mentioned in the allotment was a shifting boundary, so as to entitle the plaintiffs to make reprisal for the land lost by the advance of the sea out of the allotted lands. The owners of the lands could gain nothing by accretion. They might lose by the advance of the shore line beyond the point where the cliff was originally located. But as between them and the grantor, the site of the cliff at the time of the allotment continued, we think, to be the westerly boundary of their lands. The trial judge charged substantially in accordance with this view, and the exception to the charge upon this point is not tenable.

It was a controverted question whether the shore line had materially changed since the allotment; and upon this point much evidence was given by both parties. If it had not changed, then the plaintiffs made out a record title to the strip in controversy and were entitled to recover, unless the defendant established a title by adverse possession. The most important question now presented upon the point of adverse possession arises upon the plaintiffs' exception to the submission by the court to the jury of the question whether there had been a substantial inclosure of the premises by the defendant or his grantors, for more than twenty years prior to the commencement of the action. It appeared that fences on the lateral boundaries of the defendant's premises, extending across the strip in question into

the water to or near low-water mark, had been maintained by the defendant and his grantors for much longer than twenty years. The fences across the beach, however, were taken away in the winter, to prevent them from being carried away by the ice and the tides. The posts, as may be inferred from the evidence, were left standing, and in the spring the fences were replaced and remained until taken away again in the fall. There were bars in the fence. There was no fence in front of the cliff, but that side of the defendant's land was open to the sea. The cliff, to some extent, operated as a barrier on that side for the protection of the defendant's land. One of the alternative requirements of the statute to constitute an adverse possession is, that the land of which title by adverse possession is claimed shall have been protected by a substantial inclosure. (Code, §§ 82, 83.) In *Jackson v. Schoonmaker* (2 Johns. 229) it was held that a possession fence, which was made by trees felled and lapping one upon another, did not constitute a sufficient adverse possession to toll the right of entry of the true owner. The court said there must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail a legal title. The object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may, by unequivocal acts of the disseizor, have notice of the hostile claim and be thereby called upon to assert his legal title. In this case there was no actual inclosure by fences of the land in question. But this is not indispensable in every case. In *Jackson v. Halstead* (5 Cow. 216) title to land fronting on the Delaware river was claimed by adverse possession. Fences had been erected, extending to a point about a rod from the river, leaving some of the disputed ground uninclosed. But it was proved that the fence at this place was as near the river as the wash of the floods and the make of the ground would permit. This was held to be a sufficient inclosure. Woodworth, J., said that it would be too strict to require the

fence to be placed on the very margin of the river, where it would be liable to be swept away by the rise of water, and not within the reason of the rule defining what shall constitute an adverse possession. The learned judge further said that a river or mountain, or a ledge of rocks, on one side, forming a natural barrier, the other sides being inclosed, would, with claim of title, constitute an adverse possession. (See, also, *Becker v. Van Valkenburgh*, 29 Barb. 319.)

The requirement that the premises shall be protected by a substantial inclosure, if construed to require a continuous, un-interrupted inclosure for twenty years, would in many cases make it impossible to acquire title by adverse possession founded upon that provision. Upon such a construction, if fences were carried away by floods or destroyed by fire, or taken down in the winter for the accommodation of travel, the adverse possession would cease, although they were restored as soon as circumstances permitted. It is well understood that the bottom lands on some parts of the Mohawk river are annually overflowed, and fences are removed to prevent them from being carried away by the flood. It cannot, we think, be claimed that the temporary removal of fences for this purpose defeats an adverse possession, under the provision of the statute in respect to inclosure. In this case the land was left un-inclosed on the side toward the sea. The sea was a natural barrier, as much so as a mountain or a river or a ledge of rocks; and the sea, with the lateral fences when maintained, constituted, we think, a substantial inclosure, within the meaning of the statute. The removal of the fences during the winter was to protect them from being swept away by the ice and tides. If they had not been removed, but had been left to be carried away each winter by the sea, the defendant could, we think, have replaced them in the spring, and would not have lost his right under the statute. By the voluntary removal of the fences he simply anticipated the action of the elements; and having restored them when the danger was passed, and maintained them during the season when the use of the beach for taking seaweed was practicable, the purpose of notice, upon which the

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statute proceeds, was met. The statute is declaratory of the previous law as established in this State, and the prior decisions are proper guides to its interpretation. For these reasons we are of opinion that the court properly submitted to the jury the question whether there was a substantial inclosure of the disputed premises by the defendant and his grantors.

The court properly refused to charge that no act of taking sea-weed from the premises by the defendant or his grantors was evidence of adverse possession. It was evidence in connection with the other facts, one of which was that they claimed to prevent other freeholders of East Hampton from taking, and took it not as commoners, but under claim of exclusive right as owners, which claim was known to the plaintiffs. Nor were the plaintiffs entitled to have the jury charged that Rogers, a former owner of defendant's premises, relinquished his adverse possession when he made the agreement with the town to discontinue the suit for trespass, commenced by him in 1853, against one who had gathered sea-weed upon the beach in question, and not to sue again. The act of Rogers in discontinuing the suit and making the agreement stated was, at most, evidence bearing upon the question of adverse possession, for the consideration of the jury.

We think no error was committed on the trial which is presented by any exception in the case, and that the judgment should therefore be affirmed.

All concur.

Judgment affirmed.

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SARAH TOLES, Respondent, v. GEORGE ADEE et al., Executors,  
etc., Appellants.

*It seems* public policy requires that officers armed with bailable process for the arrest of defendants should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements. *It seems* also the fact, that, under our practice, bail taken by a sheriff on discharging a defendant from arrest stands in some sense both as bail to

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the sheriff and bail to the action, does not affect the application of the statute making void obligations taken *colore officii* in any other case or manner than as provided by law (2 R. S. 286, § 59) when the undertaking contains conditions not prescribed by law; nor is it in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality.

*It seems* also the validity of the security is not dependent upon the question whether it was voluntarily given or was extorted by actual duress and oppression.

Where, however, the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (§ 183), the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said Code (§ 187), did agree, at defendant's solicitation, to take to plaintiff's attorneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that, if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the Code, and in the meanwhile should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed, *held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that so considered it became operative and binding, though not as a statutory obligation.

It appeared that the action in which the order of arrest was issued was decided in favor of plaintiff and decision filed in the clerk's office in July, 1868. In September, 1868, the defendant's attorneys served written notice on plaintiff's attorneys to tax costs and enter judgment, but no action was taken until April, 1874, when judgment was entered and after return of a property execution unsatisfied, body execution was issued and returned by the sheriff not found. The defendant has, since 1868, resided out of the State. He returned to the State in 1869, and in 1871, remaining on each occasion several weeks. During his visit in 1871 the executors of the surety in the undertaking made search for it at the clerk's office but it had not then been filed. They then called upon plaintiff's attorney and informed him that the defendant was here and would remain a month, and that they had searched for the undertaking so as to make a surrender; they requested him to enter judgment, issue execution and enforce it, so that the estate might be discharged from liability, they offering to stipulate the costs to prevent delay. This he declined to do. *Held*, that as the undertaking was only enforceable upon the theory that it was an agreement good at common law and not requiring the aid of the statute, the testator stood as surety merely; that he was the jailer of his principal, and the statutory provisions authorizing

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bail to surrender their principal did not apply; that *laches* was a good defense to the action; and that the evidence required the submission of that question to the jury.

Bail are sureties with the rights and remedies of sureties in other cases. The neglect of a creditor, upon request of a surety, to proceed against the principal discharges the surety, if thereby the debt has been lost.

(Argued January 19, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff, entered upon an order made November 26, 1879, denying a motion for a new trial and directing judgment on a verdict.

This action was brought upon an undertaking executed by Stephen B. Adee, defendants' testator for bail.

The material facts are stated in the opinion.

*George Adee* for appellant. No cause of action survived the death of Stephen B. Adee. (3 Williams on Executors [7th ed.], 1869; De Golyer on Guarantees, etc. [Am. ed], 422; Smith on Mercantile Law, 286; *Randall v. Sackett*, 77 N. Y. 480, 482; *Jardan et al. v. Dobbins, Admr.*, 122 Mass. 168; *Harris v. Fawcett*, L. R., 15 Eq. Cas. 311; L. R., 8 Ch. App. 866; Redf. Law of Wills, 274, § 6; 2 Williams on Executors, 1604; Smith's Com. Law, 425; 3 Redf. Law of Wills, 279, § 14; *The People v. Gibbs et al.*, *Exrs.*, 9 Wend. 29; Dyer, 271, 322; 2 Bac. Abr. 245; Shaw, 176; 2 Mad. 145; *Martin v. Brady*, 1 Caines, 124; *Franklin v. Law*, 1 Johns. 402; *Risely v. Brown*, 67 N. Y. 160; *Houck v. Craighead et al.*, id. 432; *Randall v. Sackett*, 77 id. 480.) The undertaking is void in law as illegally taken by the sheriff by color of his office, and as taken while the defendant was under duress. (2 R. S. 286, § 59; *Kelly v. McCormick*, 23 N. Y. 318, 321; Code of Proc., § 192; 1 Bl. Com. marg. p. 136, 344; 2 R. S. 440, § 77; *Smith v. McFall*, 18 Wend. 523; *Wilson v. Williams*, id. 585; *McDonald v. Neilson*, 2 Cow. 139, 183; *Silvernail v. Cole*, 12 Barb. 685; *Partridge v. Com. Fire Ins. Co.*, 17 Hun, 95; 1 Bouv. Law Dict. 244; Wharton's Law Lex. 177; Tomlin's Law Dict.; *Burrall v.*



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*Acker*, 23 Wend. 606, 608; *Decker v. Judson*, 16 N. Y. 439, 442; *Martin v. Campbell*, 37 Barb. 179, 182; *Shaw v. Tobias*, 3 N. Y. 188, 192; *Burrall v. Acker*, 23 Wend. 606; *King v. Gibbs*, 26 id. 502; *Winter v. Kinney*, 1 N. Y. 365; *Richardson v. Crandall*, 48 id. 348; *Morton v. Campbell*, 37 Barb. 179, 184; *People v. Chalmers*, 1 Hun, 683; *Dale v. Bull*, 2 Johns. Cas. 239, 245; *Love v. Palmer*, 7 Johns. 159; *Strong v. Tompkins*, 8 id. 98, 100; *Sherman v. Boyce*, 15 id. 443; *Reed v. Pruyn*, 7 id. 426; *Sullivan v. Alexander*, 19 id. 233; *Millard v. Canfield*, 5 Wend. 61; *Webber's Executors v. Blunt*, 19 id. 188; *Bank of Buffalo v. Boughton*, 21 id. 57; *Barnard v. Viele*, id. 88; *People v. Meighan*, 1 Hill, 298; *Webb v. Albertson*, 4 Barb. 51, 52; *Cook v. Freudenthal*, MS. opinion, decided February 24, 1880; *S. C.*, 10 N. Y. Dig. 85; *S. C.*, 7 id. 268; *Cook v. Horowitz*, 14 Hun, 542; Code of Proc., §§ 178, 187, 201, 211; *Clapp v. Schutt*, 44 N. Y. 104; *Douglass v. Warren*, 19 Hun, 1.) The undertaking was taken for the sheriff's benefit. (Code of Proc., §§ 192, 201; *Clapp v. Schutt*, 44 N. Y. 104; *Douglass v. Warren*, 19 Hun, 1.) If the agreement set up was made with the sheriff, in contravention and evasion of the statute, it is void. (*Winter v. Kinney*, 1 N. Y. 369; Code of Proc., § 178.) Plaintiff is estopped by the sheriff's and clerk's certificates. (*Russell v. Gray*, 11 Barb. 541, 544; *McArthur v. Pease*, 46 id. 423; *Townsend v. Olin*, 5 Wend. 207; *Baker v. McDuffie*, 23 id. 289; *Dalton*, 189, 190; 1 Lord Raym. 184; *Watson on Office of Sheriff*, 72; *Anonymous*, 4 How. 112; *Sheldon v. Paine*, 10 N. Y. 398; *Hermion's Law of Estoppel*, §§ 57, 210, 215, 216, 217, 220, 346, 462; *Richardson v. Crandall*, 48 N. Y. 348, 363.) Duress avoids a contract and the surety may avail himself of the defense. (*Osborn v. Robbins*, 36 N. Y. 365; *Eadie v. Slimmons*, 26 id. 9; *Strong v. Grannis*, 26 Barb. 122; *Richards v. Vanderpoel*, 1 Daly, 71; *Foshay v. Ferguson*, 5 Hill, 154; *Watkins v. Baird*, 6 Mass. 506; *Wheaton v. Fay*, 62 N. Y. 275, 283.) If the sheriff did not tell Mr. Adee the truth as to what the bond was taken for, or if the sheriff was mistaken, then it was a mutual mistake and it should be adjudged void. (2 Kent's Com. 483, note d; *Mo-*

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*ran v. McLarty*, 75 N. Y. 25; *Dambman v. Schulting*, id. 55; *Payne v. Jaynes et al.*, id. 593; *Jackson v. Andrews*, 59 id. 244, 247; *Nevins v. Dunlap*, 83 id. 676; *Story v. Conger*, 36 id. 676; 64 id. 453, 455.) The plaintiff's neglect to enter judgment and issue executions discharged the bail. (2 R. S. 382, §§ 31, 33; *Garuntley v. Wheeler*, 31 How. Pr. 137; Code of Civil Procedure, § 572; *Sumner v. Osborn*, 11 N. Y. Weekly Dig. 25; *Whitney v. Spencer*, 4 Cow. 39, 41; *Mounsey v. Drake*, 10 Johns. 27; *Tuttle v. Kip*, 19 id. 194, 196; *Gorham v. Gale*, 7 Cow. 739; *Shaw v. Kidder*, 2 How. 244, 246; 1 Johns. 507; 1 Caines, 252; *Northern Ins. Co. v. Wright*, 76 N. Y. 445; *Craig v. Parkis*, 40 id. 186; *McMurray et al. v. Noyes*, 72 id. 523, 525; *Craig v. Parkis*, 40 id. 181; *Row v. Pulver*, 1 Cow. 246; *King v. Baldwin*, 17 Johns. 384; *Penniman v. Hudson*, 14 Barb. 579, 581; *Moakley v. Riggs*, 19 Johns. 69, 72; *Burt v. Horner*, 5 Barb. 501, 506, 509.) A guarantor is discharged in all cases where the guarantee unreasonably neglects to perform any condition upon which the liability of the guarantor depends. (*Vanderveer v. Wright*, 6 Barb. 547; *Penniman v. Hudson*, 14 id. 579; *Mains v. Hudson*, 14 id. 76; *Newell v. Fowler*, 23 id. 628; *Taylor v. Bullen*, 6 Cow. 624; *Thomas v. Woods*, 4 id. 173; *Cumpston v. McNair*, 1 Wend. 457; *Eddy v. Stantons*, 21 id. 255; *Loveland v. Shepard*, 2 Hill, 139.) The claim against a guarantor is *strictissimi juris* and the terms of the guaranty must be complied with. Nothing excused the plaintiff from immediately entering judgment and issuing executions annually upon each payment. (*Stewart v. Ranney*, 26 How. 279; *Walrath v. Thompson*, 6 Hill, 540; *S. C.*, 2 N. Y. 185; *Leeds v. Dunn*, 10 id. 469; *Henderson v. Marvin*, 11 Abb. Pr. 142; *Dobbin v. Bradley*, 17 Wend. 422; *Bebes v. Johnson*, 19 id. 500; *Newell v. Fowler*, 23 Barb. 628; *Kies v. Tift*, 1 Cow. 98; *Moakley v. Riggs*, 19 Johns. 69; *Inman v. Western F. Ins. Co.*, 12 Wend. 452; *Craig v. Parkis*, 40 N. Y. 186; *Taylor & Otis v. Bullen*, 6 Cow. 624; *White v. Case*, 13 Wend. 543.) A surety is discharged when he gives the principal notice to collect at a time when the claim can be enforced, and

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the principal refuses. (*Remson v. Backman*, 25 N. Y. 552, 555; *Paine v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 id. 383; *Manchester Iron Manf. Co. v. Sweeting*, 10 Wend. 162; *Huffman v. Hulbert*, 13 id. 375; 1 Story's Eq. Jur., § 325; *Northern Ins. Co. v. Wright*, 13 Hun, 166; 76 N. Y. 445.) The contract of Stephen B. Adee is simply that of suretyship. (*Wood v. Fisk*, 63 N. Y. 245; *Rathbone v. Warren*, 10 Johns. 587, 595.) Bail to the action may be released on motion, if their principal is discharged from his debts before their liability is fixed as bail. (*Knapp v. Anderson*, 1 N. Y. 466; *People v. Manning et al.*, 8 Cow. 297, 299; 2 R. S. 330, § 16; Code of Proc., §§ 150, 191; Code of Civil Proc. 507, 601; *Monroe v. Upton et al.*, 6 Lans. 255; *S. C.*, 50 N. Y. 593, 597; *Clark v. Rawling*, 3 id. 216, 222; U. S. R. S., §§ 5067, 5071; *Carpenter v. Turrell*, 100 Mass. 450; *Odell v. Walten*, 38 Ga. 224; *Cornell v. Dakin*, 38 N. Y. 253; *Poppenhausen v. Seely*, 3 Abb. Ct. App. Dec. 615; *Payne v. Able*, 7 Bush [Ky.], 344; *S. C.*, 4 Bank. 220; 1 Burr, 244; 3 Bl. Com. 292, n. 31; Tidd's Pr. [8th ed.] 290 to 295, 403, 1147, 1182, 1187; *Martin v. Kilbourn*, Cent. L. J. 94; *Barber v. Rogers*, 71 Penn. St. 362; *Seaman v. Drake*, 1 Caine, 9; *Kane v. Ingraham*, 2 Johns. Ch. 403; *Olcott v. Lillie*, 4 Johns. 407; *Trumbull v. Healey*, 21 Wend. 670; *Buckman v. Cowell*, 1 N. Y. 505; *Ocean Nat. Bk. v. Olcott*, 46 id. 12, 16; *Depuy v. Swart*, 3 Wend. 135; *Baker v. Wheaton*, 5 Mass. 509.) Plaintiff's neglect to file the undertaking prevented a surrender and *exoneretur*. (Code of Proc., §§ 188 423; *Wilson v. Williams*, 18 Wend. 581, 583; *People v. Bartlett*, 3 Hill, 570, 571; *People v. Cook*, 30 How. 110, 114; *People v. Cuskeney*, 44 Barb. 118; *People v. Manning*, 8 Cow. 297; *Carpenter v. Stevens*, 12 Wend. 589; *Cozine v. Walter*, 55 N. Y. 304, 309.) The plaintiff, by keeping the undertaking from the clerk's office, prevented a surrender and an *exoneretur* and cannot take advantage of it. (Code of Proc., §§ 188, 189, 191; 2 R. S. 330, §§ 21, 22; *Cozine v. Walter*, 55 N. Y. 304, 308, *supra*; Herman's Law of Estoppel, §§ 228, 462; *Young v. Hunter*, 6 N. Y. 203; *Moses v. Bier-*

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ling, 31 id. 462, 464; *Clark v. Niblo*, 3 Wend. 24; *S. C.*, 6 id. 237.) Plaintiff cannot profit by the fraud of her agent, whether she knew it or not. (*Bennett v. Judson*, 21 N. Y. 238; *Hathaway v. Johnson*, 55 id. 93, 96; *Cosgrove v. Ogden*, 49 id. 255; *J. P. & C. R. Co. v. Tyng*, 63 id. 653; *Elwell v. Chamberlain*, 31 id. 611, 619; *Crans v. Hunter*, 28 id. 389; *Craig v. Ward*, 3 Keyes, 387; *Kerr v. Mount*, 28 N. Y. 659; *Brainerd v. Dunning*, 30 id. 211.) The sheriff's official certificate being conclusive against the bail it was conclusive against the plaintiff. (*Townsend v. Olin*, 5 Wend. 207; *Baker v. McDuffie*, 23 id. 289; Dalton, 189, 190; 1 *Ld. Raym.* 784; Watson on Office of Sheriff, 72; *Anonymous*, 4 How. 112; *Sheldon v. Paine*, 10 N. Y. 398; Herman's Law of Estoppel, §§ 57, 210, 346, 462.)

*I. II. Maynard* for respondent. It was unnecessary to allege that in the complaint an execution against the property of Augustus W. Adee had been issued and returned unsatisfied. (*Renick v. Orsen*, 4 Bosw. 384, 389; *Hinman v. Beers*, 13 Johns. 529; *Scott v. Shaw*, id. 378; 3 Tiffany & Smith's Pr. 99, note.) It was also unnecessary to allege that an execution against the body of Augustus W. Adee, having at least fifteen days between the teste and the return thereof, had been issued. (Old Code, § 289; *Fake v. Edgerton*, 3 Abb. Pr. 229; *Bened v. Lynch*, 44 N. Y. 162.) The action in which the order of arrest was issued was one in which, under the provisions of the Code, an order of arrest could be properly issued. (*McIntosh v. McIntosh*, 12 How. 289; *Jamieson v. Jamieson*, 11 Hun, 38; *Gardiner v. Gardiner*, 3 Abb. N. C. 1.) In any event the surety upon the undertaking is estopped from raising any such question. (*Gregory v. Levy*, 12 Barb. 610; *Kelley v. McCormack*, 28 N. Y. 318.) The undertaking in question bound the estate of Stephen B. Adee, although no actual breach occurred in his life-time, and an action can be maintained against his executors to recover for a breach occurring after his death. (3 R. S. [6th ed.] 123, § 2; 3 Redf. on Executors, 277, § 9; *Frederick v. Frederick*, 1 P. Wms. 710-

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721; *Hyde v. Skinner*, 2 id. 196-197; *Hyde v. Dean and Canons of Windsor*, Cro. Eliz. 552-553; Dayton's Surrogate, 486-555; *Getty v. Binsee*, 49 N. Y. 385; Yates' Pleadings, 61; *Metcalf v. Stryker*, 31 N. Y. 257; Graham's Practice, 427, 430; *Wheeler v. Wheeler*, 7 Mass. 169; *Meadowcroft v. Sutton, Ex'rs*, 2 Bosanquet & Puller, 61.) The undertaking was not void on the ground that it was taken by the sheriff *colore officii*. (Tomlyn's Law Dic.; *Winter v. Kinney*, 1 Comst. 365; *Decker v. Judson*, 16 N. Y. 442; *Kelley v. McCormack*, 28 id. 318; *Burrall v. Acker*, 23 Wend. 606; *Webber's Executors v. Blunt*, 19 id. 188; *Morton v. Campbell*, 37 Barb. 179; *Norden v. Horsley*, 2 Wils. 69; *Cook v. Horwitz*, 14 Hun, 542; *Cook v. Fredenthal*, 80 N. Y. 202.) This undertaking was accepted by the plaintiff herself, acting through her attorneys; and the statutes declaring void securities taken by public officers, *colore officii*, have no application to a security taken by a party at whose suit an arrest is made. (Voorhies' Code [10th ed.], 394; *Winter v. Kinney*, 1 N. Y. 368; *Decker v. Judson*, 16 id. 443; *Cadwell v. Colgate*, 7 Barb. 258, 259; *Morton v. Campbell*, 37 id. 184; *Harp v. Osgood*, 2 Hill, 216; *Armstrong v. Garrow*, 6 Cow. 465; *Burrall v. Acker*, 23 Wend. 606; *Ring v. Gibbs*, 26 id. 502; *Kavanagh v. Saunders*, 8 Greenl. 342; Cro. Eliz. 190; *Hall v. Carter*, 2 Mod. 304; *Pilkington v. Green*, 2 Bos. & Pul. 151; *Sugars v. Brinkworth*, 4 Camp. 46; *Burrall v. Acker*, 23 Wend. 606; *Cadwell v. Colgate*, 7 Barb. 258; *Winter v. Kinney*, 1 N. Y. 368; 3 R. S. [6th ed.] 448, § 49; *Clapp v. Schutt*, 44 N. Y. 104.) The word "law," as used in the statute, is not to be restricted to statute law, and if the bond is one which would have been good at law, it is not within the prohibition of the statute. (*Chamberlin v. Beller*, 18 N. Y. 115; *Griffiths v. Hardenberg*, 41 id. 464; *Decker v. Judson*, 16 id. 443; *Turner, etc., v. Hadden*, 62 Barb. 480; *Cornell v. Dakin*, 38 N. Y. 253.) The return was not in any sense conclusive, nor did it preclude the parties from showing all the facts and circumstances under which it was made. (*Codwise v. Fild*, 9 Johns. 263; *Bank of Orange County v. Wakeman*,

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1 Cow. 46; *Dubois v. Dubois*, 2 Wend. 416; *Townsend v. Olin*, 5 id. 207; *Browning v. Hanford*, 5 Den. 586.) The defendants are estopped from raising any question as to the irregularity, invalidity, or illegality of this undertaking. (*Levi v. Dorn*, 28 How. 217; *Bowne v. Mellor*, 6 Hill, 496; *Coleman v. Bean*, 14 Abb. 38; *Bates v. Merrick*, 2 Hun, 568; *Chamberlin v. Applegate*, id. 511; *Stever v. Sornberger*, 24 Wend. 275; *Gregory v. Levy*, 12 Barb. 610; *Morton v. Campbell*, 37 id. 179; *Fake v. Whipple*, 39 id. 338; *Jarvis v. Sewell*, 40 id. 459; *Coleman v. Bean*, 32 How. 370; *Shaw v. Tobias*, 3 N. Y. 188; *Decker v. Judson*, 16 id. 439; *Egbert v. Darr*, 3 Watts & Serg. 517; *Morse v. Hodson*, 5 Mass. 314; *Holbrook v. Klenert*, 113 id. 268; *Clapp v. Guild*, 8 Mass. 153; *Ring v. Gibbs*, 26 Wend. 502.) A person may waive any statutory, or even constitutional provision enacted for his protection and affecting only his property or rights. (*Williams v. Potter*, 2 Barb. 316; *Buell v. Trustees*, 3 N. Y. 197; *Root v. Wagner*, 30 id. 9; *Pfyfe v. Eiller*, 45 id. 102; *Stever v. Sornberger*, 24 Wend. 275; *Col. Ins. Co. v. Force*, 8 How. 353; *Gregory v. Levy*, 12 Barb. 610; *Dale v. Radcliff*, 25 id. 333; *Morton v. Campbell*, 37 id. 184; *Shaw v. Tobias*, 3 Const. 188.) Whatever representations the sheriff may have made as to the legal effect of the undertaking, even if untrue, it did not constitute a fraud for which the plaintiff can be held responsible. (*Wheaton v. Fay*, 62 N. Y. 575; *Duffany v. Ferguson*, 66 id. 482; *March v. Falker*, 40 id. 562; *Meyer v. Meyer*, 45 id. 169; *Oberlander v. Speiss*, id. 175; *Hubbell v. Meigs*, 50 id. 480; *Marshall v. Fowler*, 7 Hun, 253; *Kerr v. Mount*, 28 N. Y. 659; *Raney v. Weed*, 3 Sandf. 577; *Hall v. Waterburry*, 5 Abb. N. O. 374; *Welsh v. Lochran*, 63 N. Y. 181; *Kelly v. Christal*, 16 Hun, 242; *Western L. Ins. Co. v. Clinton*, 66 N. Y. 326; *Coleman v. Bean*, 3 Keyes, 97.) The liability of defendants' testator upon the undertaking was not discharged by the discharge of Augustus W. Adee, in bankruptcy. (*McCombes v. Allen*, 8 Weekly Dig. 337; *Knapp v. Anderson*, 71 N. Y. 466; *Hol-yoke v. Adams*, 1 Hun, 223; 2 N. Y. S. C. [T. & O.] 1; 59 N. Y. 241-2; *Hoyt v. Freel*, 8 Abb. [N. S.] 232; *Matter of White-*

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house, 4 Bk. Reg. 15; 2 Alb. L. J. 359; *Minor v. Van Nostrand et al.*, 4 B. R. 28; 2 Alb. L. J. 268; *Grover & Baker v. Clinton*, N. B. R. 112, and 8 Alb. L. J. 268; *Matter of Hennecksborough & Block*, 7 N. B. R. 37, and 6 Alb. L. J. 309; *Robinson et al. v. Pesant*, 53 N. Y. 419; *Rudge v. Rundle*, 9 Alb. L. J. 110.) The failure or omission to file the undertaking in the clerk's office until Nov. 11, 1872, was at most a mere irregularity and did not invalidate the instrument, or release or exonerate the defendants' testator from liability thereon. (Old Code, § 192.) A surety in an undertaking in an action in court does not occupy the same relation to the party for whose benefit the bond is given as a surety for a debtor occupies toward a creditor, and he cannot, by a simple notice to the party, control the conduct of the suit. (*Jewett v. Crane*, 35 Barb. 208.) The delay in the entry of judgment was not the fault of plaintiff or her attorneys, and notice to her attorneys to enter judgment was ineffectual for any purpose. It was the duty of the clerk upon the filing of the decision to enter judgment. (Old Code, §§ 278, 279, 280, 281; *Renouil v. Harris*, 2 Sandf. 641; *Earl v. Barnard*, 22 How. 437; *Heinemann v. Waterbury*, 5 Bosw. 686; *Purdy v. Peters*, 15 Abb. 160; *Macomber v. The Mayor, etc.*, 17 id. 46; *Hoffnung v. Grove*, 18 id. 14; *Petrie v. Fitzgerald*, 2 Abb. [N. S.] 354; *Henry v. Bow*, 20 How. 215; *Stinson v. Huggins*, 16 Barb. 658.) The attorney's authority did not extend to the performance of any affirmative act upon his part which could operate as a release of the bail, and he could not release them by any act or omission, default or neglect, of which the plaintiff had no knowledge, and to which she did not consent. (*McCrea v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 id. 229; *Beardsley v. Root*, 11 id. 464; *Simonton v. Barrell*, 21 Wend. 362; *Averill v. Williams*, 4 Den. 295; *Shaw v. Kidder*, 2 How. Pr. 244; *Lewis v. Woodruff*, 15 id. 539; *East River Bk. v. Kennedy*, 9 Bosw. 543; *Bennett v. Third Ave. R. R.*, 45 N. Y. 628; *Beers v. Hendrickson*, id. 665; 6 Rob. 93.) Defendants had the power at any time to surrender Augustus W. Adee in their

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own exoneration, which is a conclusive answer to their claim to have suffered loss in consequence of the plaintiff's delay in issuing execution. (3 Bl. Com. 290; *Anonymous*, 6 Mod. 231; *French's Case*, id. 247; *Sheer v. Brooks*, 2 H. Bl. 120; *Ex parte Gibbons*, 1 Atk. 237; *Anonymous*, Show. 214; *Nichols v. Ingersoll*, 7 Johns. Cas. 413; *Harp v. Osgood*, 2 Hill, 216; *Ex parte Lyne*, 3 Stark. 470; Old Code, § 189; *Van Rensselaer v. Hopkins*, Col. & O. Cas. 481; *Wheeler v. Wheeler*, 7 Mass. 169; *Meadowcroft v. Sutton*, *Ex'rs*, 2 Bos. & Pul. 61.) Even as between a creditor and the surety of his debtor, in order to exonerate the surety, by failure to proceed against the principal, the surety must show a full and explicit notice or request to the creditor to proceed without delay, an improper neglect to do so, and that thereby recovery of the debt from the principal has been lost. (*Mounsey v. Drake*, 10 Johns. 27; *Pain v. Packard*, 13 id. 174; *Fulton v. Matthews*, 15 id. 433; *King v. Baldwin*, 17 id. 384; *Warner v. Beardsley*, 8 Wend. 194; *Huffman v. Hulbert*, 13 id. 377; *Herrick v. Borst*, 4 Hill, 650; *Valentine v. Farrington*, 2 Edw. 58; *Thompson v. Hall*, 45 Barb. 214; *Singer v. Troutman*, 49 id. 182; *Field v. Cutter*, 4 Lana. 195; *Schroepfel v. Shaw*, 3 N. Y. 446; *McKechnie v. Ward*, 58 id. 541; *Clark v. Sickler*, 64 id. 231.) The relation of creditor and debtor did not exist between plaintiff and the defendants' principal, and hence they are not in a situation to invoke the rule which obtains where the relation of surety grows out of a simple contract between the parties. (*Davey v. Prendergrass*, 5 Barn. & Ald. 187, 191; *Rathbone v. Warren*, 10 Johns. 587.) Interest was properly allowed upon the amount of the judgment for which execution was issued. (*Levi v. Nichols*, 19 Abb. 282; *Willett v. Lasalle*, id. 272; *Treadwell v. McKeal*, 2 Johns. Cas. 340; *Walker v. Waterman*, 50 Vt. 107.)

ANDREWS, J. The order of arrest issued in the action of Sarah L. Adee (now Sarah L. Toles), against her former husband, Augustus W. Adee, was in the form prescribed by section 183 of the Code of Procedure, and required the



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sheriff to arrest the defendant and hold him to bail in the sum of \$1,000. The sheriff arrested the defendant, and at the time of the arrest delivered to him a copy of the order of arrest and of the affidavit upon which it was granted. The sheriff, after the arrest had been made, went with the defendant to the house of his father, Stephen B. Adee, upon the defendant's suggestion that he would procure his father and some other person to execute the requisite undertaking for his release on bail. It was there proposed to the sheriff that he should accept an undertaking executed by the father alone. The sheriff declined to do this, but finally, upon the urgent solicitation of the defendant, agreed that if the defendant's father would execute an undertaking in the sum of \$2,000, he would take it to the plaintiff's attorneys, and if they approved and accepted it, the defendant should be discharged from the arrest, the defendant on his part agreeing that if the plaintiff's attorneys should decline to accept the undertaking, then, on being notified of the fact by the sheriff, he would cause a new undertaking to be executed with two sureties, as required by the order, and that meanwhile he should remain in the custody of his father. An undertaking was thereupon executed by Stephen B. Adee, and delivered to the sheriff, who, on receiving it, discharged the defendant from actual custody. The plaintiff's attorneys accepted the undertaking, and judgment having been obtained in the action in favor of the plaintiff, this action is brought upon the undertaking against the executors of Stephen B. Adee, for a breach of the condition that Augustus W. Adee should hold himself amenable to the process of the court during the pendency of the action, and to such as might issue to enforce the judgment therein.

The undertaking was not in conformity with the statute. The statute prescribes that the undertaking of bail shall be executed by two or more bail. (Code, § 187.) Nor did the undertaking comply with the order of arrest. The order required the sheriff to take bail in the sum of \$1,000, whereas the undertaking is in double that sum. It is insisted by the defendants that the undertaking is void *colore officii* within the stat-

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ute, which enacts that "no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed, shall be void." (2 R. S. 286, § 59.)

Section 183 of the Code requires that the order of arrest shall specify the sum for which the defendant shall be held to bail. The amount of bail is to be fixed by the judge granting the order. The plain object of this requirement of the statute is to prevent the exaction of unreasonable or oppressive bail, and to leave nothing to the discretion of the officer executing the process. The sum mentioned in the order limits the power of the officer; and if he exacts an undertaking for a greater sum, the undertaking is clearly within the statute and void. We have had occasion recently, in the case of *Cook v. Freudenthal* (80 N. Y. 205), to pass upon the validity of an undertaking taken by a sheriff from a defendant arrested in an action for the claim and delivery of personal property, which contained a provision beyond what was required by the statute; and we held that the bond was for that reason void and could not be enforced at the suit of the plaintiff in the action, although the sheriff appeared to have acted in good faith. Further reflection has confirmed the opinion we then entertained, that public policy requires that officers armed with bailable process for the arrest of defendants should, in taking bonds or other securities for their enlargement, be held to a strict compliance with statutory requirements, neither accepting less nor demanding more than the law prescribes. Taking bail in personal actions was made compulsory upon sheriffs by the statute 23 Hen. VII, chap. 8; and this privilege was made more definite and secure by subsequent enactments. The statute Hen. VII related to bail on *means* process only. The right of the sheriff to take bail for the appearance of defendants to answer a writ or process is said, in *Dive v. Maningham* (1 Plowden, 67), to have existed before the statute at common law, although this is denied in *Beaufage's Case* (10 Co. 426). The statute required sheriffs to let to bail prisoners ar-

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rested in personal actions, upon their giving reasonable surety to keep their days, etc., and prescribed the form of the bond, and that it should be on condition that the prisoner appear at the day contained in the writ, etc., and in such place as the writ requires; and then followed the provision that if any sheriffs take any obligation in other form, by color of their offices, it should be void. This was the original of the statutory enactments found in this and most of the States prohibiting and making void bonds taken *colore officii*. But our statute, as was said by COWEN, J., in *Webber's Ex'rs v. Blunt* (19 Wend. 191), is much broader than the statute 23 Hen. VII. The bail required to be taken by that statute was what was known under the common-law practice as bail to the sheriff or bail below, and the bonds or obligations referred to were those taken in the first instance for the appearance of the prisoner arrested to answer the writ. But our statute applies to every bond, obligation or security taken by a sheriff or other officer, by color of his office, contrary to his duty. Under our practice the undertaking to be given by a defendant in a civil action to be released from arrest stands in the place both of bail to the sheriff and bail to the action, or special bail under the former system. The sheriff, in taking an undertaking on letting to bail, acts both in the interest of himself and of the plaintiff. If the bail fail to justify on demand, he stands liable as bail, and has a remedy over against the bail, unless other bail be given or justify. (Code, §§ 201, 203.) The statute of Henry VII was strictly construed by the English courts; and securities or agreements taken by sheriffs, not in strict conformity with its provisions, were held to be void. (*Scryven v. Dyther*, Cro. Eliz. 672; *Rogers v. Reeves*, 1 Term R. 418; *Fuller v. Prest*, 7 id. 110.) These decisions have been followed in analogous cases in our courts. (*Sullivan v. Alexander*, 19 Johns. 233; *Bank of Buffalo v. Boughion*, 21 Wend. 57; *Barnard v. Viele*, id. 88; *People v. Meighan*, 1 Hill, 298.) The fact that under our practice the bail taken by the sheriff, on discharging a prisoner from arrest, stands in some sense both as bail to the sheriff and as bail to the action, does

not, we think, at all affect the application of the statute making void obligations taken *colore officii*, when the undertaking contains conditions not prescribed by law; nor is it, as we conceive, in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality. Such a principle, if admitted, would defeat the purpose of the statute. The statute, like the statute of Henry VII, is specially designed to prevent extortion and oppression by officers of prisoners in their custody. The law prescribes the nature of the undertaking and the duty of the sheriff. If the officer takes an illegal security, he is liable to the plaintiff in a proper action; but the plaintiff cannot be permitted to elect to enforce an undertaking illegally taken, when it is for his interest to do so. The statute does not admit of such a construction. The illegal security is wholly void, and can be enforced neither by the sheriff nor by the plaintiff. It is, we think, no answer to the defense based upon the statute, that the illegal security was taken at the instance of the defendant. The security is not good or bad, depending on the circumstance whether it was voluntarily and willingly given, or was extorted by actual duress and oppression. The law defines the condition of the undertaking that the duty of the officer and the right of the party in custody may be plainly understood, and that nothing be left to conjecture or in uncertainty. Courts justly regard with great jealousy all departure by officers holding prisoners under arrest from the strict line of duty. The undertaking in this case bound the surety in double the sum authorized by the order of arrest, and if the undertaking is to be regarded as taken by the sheriff in his official character and in the exercise of his official authority, it must, both upon principle and authority, be held to be void.

But we are inclined to the opinion that the undertaking in question may, in view of the circumstances under which it was made, be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff, under the claim or in the exercise of official authority. It is said by Blackstone (1 Bl. Com. 137) that if a man be lawfully arrested, and, either to procure his discharge or on any

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other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. This principle of the common law has been applied in several cases, in actions upon agreements claimed to be void under the statute Henry VII; and it has been held that where the agreement to discharge a party from arrest was between the parties to the action, it could be enforced by the plaintiff, although it did not conform to the statute. It is competent for the parties, independently of the statute, to agree upon the terms and conditions upon which the discharge shall be had. In *Milward v. Clerk* (Cro. Eliz. 190), the defendant having been arrested at the plaintiff's suit, in consideration that he should be permitted to go at large, and that the plaintiff would give his warrant to the bailiff, to suffer him to go at large, promised the plaintiff to appear at the day of the return of the process, or pay him ten pounds. In an action upon this promise the defendant pleaded the statute 23 Henry VII; but the court said: "It is a good assumpsit, being made to the party who had authority to dispense with the appearance; but if the promise had been made to the sheriff, or to any one to his use, it had been within the equity of the statute." In *Hall v. Carter* (2 Mod. 304), the action was upon a bond executed by the defendant to the plaintiff, conditioned that if a third person (who had been arrested at the suit of the plaintiff) should give security for the payment of the plaintiff's debt, or should render his body to prison at the return of the writ, the obligation should be void. The defendant pleaded the statute, and the plaintiff demurred. The court sustained the demurrer, and gave judgment for the plaintiff, saying, "There is no law that makes the agreement of the parties void; and if the bond was not taken by such agreement, it might have been traversed." The same principle was recognized and applied in *Winter v. Kinney* (1 N. Y. 365). The court reversed the judgment below, on the ground that the question should have been submitted to the jury whether the agreement under which the plaintiff paid the money, which he sought to recover back, was made with the sheriff or with the party at whose suit he

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was arrested; the court saying the party may make such agreement or take such security as he pleases, on discharging his debtor from arrest. (See, also, *Harp v. Osgood*, 2 Hill, 216.) The evidence shows that the sheriff declined at first to take the undertaking in question, doubting his authority to do so. He did not take it in the exercise of his official authority. He simply, as the transaction is proved, consented, at the solicitation of Adee, to act as the intermediary to ascertain whether the plaintiff's attorneys would accept the undertaking, and, discharge him from arrest. When the plaintiff's attorneys consented to the proposition and accepted the undertaking, it became operative and binding, not as a statutory obligation, but as a common-law agreement between the parties, for a breach of which an action would lie, as upon any other assumpsit.

The remaining question which we deem necessary to consider is, whether there was evidence tending to establish the defense, that the plaintiff, by her laches, had discharged the surety or his estate from liability. The judge directed a verdict for the plaintiff, and if such evidence was given, the direction of a verdict was error. It appears that the action of *Adee v. Adee* was tried at Special Term, and resulted in a decision, July 28, 1868, granting the plaintiff a limited divorce, and adjudging the payment by the defendant to her of a certain sum annually for her support and maintenance. The decision was filed in the clerk's office of the proper county July 30, 1868, but no further action was taken by the plaintiff until April 21, 1874, when judgment was entered by her attorneys, in conformity with the decision made nearly six years before. Subsequently execution was issued against the property of the defendant; and after its return unsatisfied, an execution was issued against the body, to which the sheriff returned, not found. But before this, and in September, 1868, the attorneys for Adee served written notice on the plaintiff's attorneys to tax the costs and enter judgment in the action. Stephen B. Adee died in 1870, leaving a will, by which he appointed the defendants his executors. Augustus W. Adee has resided since 1868 out of the State.

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He returned to this State in 1869 and 1871, and remained on each occasion several weeks, visiting his relatives in Delaware county, where he formerly resided. During his visit in 1871, the executors of Stephen B. Adee made search at the clerk's office for the undertaking executed by their testator, but were unable to find it, it not having, at that time, been filed. They then called upon the plaintiff's attorney and informed him that Augustus W. Adee was here, and would remain a month or more; that they had searched the clerk's office and could not find the undertaking, so as to make a surrender and be exonerated; and requested him to enter judgment and issue executions and enforce them against Augustus W. Adee, so that the estate might be discharged from liability on the bond. The executors offered to stipulate the costs, to prevent delay, but the attorney replied that he preferred to take the usual way. Nothing was done in response to the request of the executors. Augustus W. Adee remained within reach of execution four or five weeks after this, and then returned to his home in another State.

Bail are sureties, with the rights and remedies of sureties in other cases. (*Livingston v. Bartles*, 4 Johns. 478; *Rathbone v. Warren*, 10 id. 587.) The case of *King v. Baldwin* 17 Johns. 384) declared the doctrine which has been followed in subsequent cases, that a surety is discharged by the neglect of the creditor, upon request of the surety, to proceed against the principal, if thereby the debt has been lost. (*Remsen v. Beckman*, 25 N. Y. 552; *Colgrove v. Tallman*, 67 id. 95, and cases cited.) The doctrine was applied in *Row v. Pulver* (1 Cow. 246), in an action brought by the plaintiff upon an instrument executed on an adjournment of a cause in a justice's court, to the effect that the defendant in the action should stand trial and pay the damages and costs, or render himself on execution, in case judgment was given against him in the action. The surety, after judgment against his principal, requested the plaintiff to charge him in execution, and failing to do so, as he might have done, the surety was held to be discharged. We

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perceive no reason why the doctrine of *King v. Baldwin* is not applicable in this case. It is said that the statute provides for the exoneration of bail by the surrender of the principal, and that it was incumbent on the defendants (who for this purpose represented the testator) to take the steps prescribed by the statute, if they desired to be released from liability. (Code, §§ 188, 191; *Maddowcroft v. Sutton*, 1 B. & P. 61.) But it is a sufficient answer to this position, that the right of surrender under the statute is an incident to the statutory obligation. Bail are said to be the jailers of their principal, and he may be kept by the bail for their indemnity, for the reason stated by Lord Coke (4 Inst. 178): "because the court of justice doth deliver him unto them to be safely kept." It is not every agreement made by a surety for the appearance of a defendant in a bailable action which confers upon the surety the right to the custody of the principal, or the power to surrender him at any time in exoneration of the surety's liability. This was one of the distinctions between *bail* and *mainprize*. These words are often used in the old books as synonymous, and both are obligations for the appearance of a party and to save him from imprisonment, and the chief difference is said to be, "that a man's mainpernors are barely his sureties, and cannot imprison him themselves to secure his appearance, as his bail may, who are looked upon as his jailers." (Bac. Abr., tit. Bail.) In *Tuttle v. Kip* (19 Johns. 194), it was held that the common-law incidents of a recognizance of bail, according to the practice of courts of record, do not apply to a justice's court, and that a surety could not surrender his principal against his consent or without an execution. (See, also, *Row v. Pulver*, *supra*.) In this case, if the undertaking is regarded as having been taken by the sheriff, it is void and cannot be enforced. The plaintiff can only maintain the action upon the theory that it is an agreement between the parties good at common law and not requiring the aid of the statute. So treating it, the defendant's testator stood as surety merely that his principal would hold himself amenable to process. He was not the jailer of his principal, and the statutory provisions au-



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thorizing bail to surrender their principal before judgment do not apply to the case. We are of opinion that the question of laches should have been submitted to the jury. It may not conclusively appear that if the plaintiff had acted promptly on request of the representatives of the surety, the principal could have been taken in execution. But the defendants were entitled to the finding of the jury upon this defense. We are also of opinion that the request and notice to the plaintiff's attorneys was equivalent to notice to the plaintiff. They had charge of the litigation. Their authority as attorneys continued after the decision of the case, for the purpose of entering judgment and issuing execution. It would be very inconvenient and contrary to the common understanding, to hold that in a case like this they did not represent the plaintiff.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

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WILLIAM BRASSELL, as Administrator, etc., Respondent, v.  
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD  
COMPANY, Appellant.

A passenger, when taking or leaving a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty which requires it to provide passengers a safe passage to and from the train.

A passenger, therefore, is not, in all cases liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains.

Defendant ran a train upon its road daily from S. to E. S., primarily for the purpose of carrying its employees to E. S., where it had a machine shop and freight-house; it carried, however, on this train persons going as ordinary passengers, on payment of fare, and it was in charge of a uniformed conductor. There was a station-house at E. S., on the south side of the road; this train did not stop at the station, but at a point 1,300 feet further east, opposite the freight-house located north of

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the road. At this point there were about twenty tracks; the road was not planked and there was nothing to indicate on which side passengers should leave the train. E., plaintiff's intestate, a girl seventeen years of age, took this train, in company with an old lady, at S. to go to E. S., where she resided. The train stopped at the usual place on the third track from the south. The two south tracks were used for ordinary passenger trains. E. got off on the south side of the train and assisted her companion to alight. There was a path about seventy feet west leading south to or near the house where she was employed, which was south of the road. The two walked a few steps in a south-westerly direction until they reached the second track, when a passenger train from the east, which was behind time and running thirty-five or forty miles an hour, struck and killed them both. In an action to recover damages the evidence tended to show that they did not look to the east after leaving the car, and that if they had done so they could have seen the approaching train; also that no person connected with the train gave any instructions to passengers where to alight or any warning of the approaching train. *Held*, the fact that the deceased did not look, while it was a material and important one for the consideration of the jury upon the point of contributory negligence, did not establish it as matter of law; and that a refusal of the court to charge that it was *per se* negligence was not error.

(Submitted January 20, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 6, 1880, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for the death of Ellen C. Brassell, plaintiff's intestate, alleged to have been caused by defendant's negligence.

The facts appear sufficiently in the opinion.

*George N. Kennedy* for appellant. The motion for a non-suit should have been granted upon the ground that the negligence of plaintiff's intestate contributed to the injury. (*Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440; *Filer v. N. Y. C. & H. R. R. R. Co.*, 49 id. 51; *Ernst v. Hudson River R. R. Co.*, 39 id. 62; *Wilcox v. Rome & Watertown R. R. Co.*, id. 358; *Havens Case*, 41 id. 298; *Baxter Case*, id. 504; *Stackus Case*, 79 id. 464.) The defendant was guilty of no

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negligence in the light of all the evidence. (*Nolton v. Western R. R. Co.*, 15 N. Y. 444, 447.)

*Hiscock, Gifford and Doheny* for respondents. The death of the deceased was caused by the wrongful act, neglect or default of the defendant. (3 R. S. 569 [Banks Bros'. ed.].) When a railroad company admits passengers into a caboose car attached to a freight train to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though they were in the regular passenger coaches. (*Edgarton v. N. Y. & H. R. R. Co.*, 39 N. Y. 227.) Whether the deceased paid fare or not, she was a passenger. (*Buffett v. The T. & B. R. R. Co.*, 40 N. Y. 171; *Bissell v. The Mich. S. & N. I. R. R. Co.*, 22 id. 307; *Terry v. Jewett*, 17 Hun, 399.) The company was bound to provide a safe place for passengers to land, and it was negligence to land passengers at an unsafe and dangerous place. (*Hulbert v. N. Y. C. & H. R. R. R. Co.*, 40 N. Y. 146; *Green v. Erie R. R. Co.*, 11 Hun, 333; *Armstrong v. N. Y. C. & H. R. R. R. Co.*, 66 Barb. 437; affirmed, 53 N. Y. 623; *Liscomb v. N. J. R. & T. Co.*, 6 Lans. 78.) It was negligence on the part of the conductor to pay no attention to the discharge of his passengers. (*Gonzales v. The N. Y. C. & H. R. R. R. Co.*, 39 How. 407; *Keller v. The N. Y. C. & H. R. R. R. Co.*, 24 id. 172-180; *Armstrong v. The N. Y. C. & H. R. R. R. Co.*, *supra*; *Dickens v. The N. Y. C. & H. R. R. R. Co.*, 1 Keyes, 26.) The deceased was not guilty of contributory negligence. (*Gonzales v. N. Y. C. & H. R. R. R. Co.*, 39 How. 407; *Hulbert v. N. Y. C. & H. R. R. R. Co.*, 40 N. Y. 145; *Green v. Erie R. R. Co.*, 11 Hun, 333; *Armstrong v. N. Y. C. & H. R. R. R. Co.*, 66 Barb. 437; *Dickens v. N. Y. C. & H. R. R. R. Co.*, 1 Keyes, 28.) The question of contributory negligence was properly left to the jury. (*Hoffman v. N. Y. C. & H. R. R. R. Co.*, 13 Hun, 589; *Terry v. Jewett*, 78 N. Y. 338.) Under the circumstances contributory negligence on the part of the deceased does not

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constitute a bar to a recovery. (*Kenyon v. N. Y. C. & H. R. R. Co.*, 5 Hun, 479.)

ANDREWS, J. On the morning of April 10, 1868, the plaintiff's intestate, a girl seventeen years of age, entered the cars of the defendant at Syracuse to go to East Syracuse, a station on the line of defendant's road, where she had resided for seventeen months prior to that time. The train was not one of the regular passenger trains upon the defendant's road. It ran in the morning from Syracuse to East Syracuse, primarily for the purpose of conveying employ es of the road to the latter place, where a machine shop and freight-house of the defendant were located, and returned in the evening to take the employees to their homes. But the defendant carried on this train other persons desiring to go thereon, as ordinary passengers, on the payment of fare and it was in charge of a uniformed conductor. There was a station-house at East Syracuse, located on the south side of the road, but this train did not stop at the station, but at a point about 1,300 feet further east, opposite the freight-house and yard of the defendant located north of the tracks. There were at this point about twenty tracks. The special train ran on the third track from the south, and the two tracks between this track and the south line of the road were used for ordinary passenger trains. The road at the point where the special train stopped was not planked, and there was nothing in the arrangements of the roadway to indicate on which side passengers should leave the train. The house where the deceased was employed was about two hundred feet south of the defendant's road in sight of the trains passing thereon. On the morning in question the "special" stopped at the usual stopping-place, and thirty or forty employees of the defendant left the cars on the north side to go to their work. The deceased was in company with an old lady, and when the train stopped, she got off on the south side of the cars, and then turned around to assist the old lady in alighting. There was a path seventy or eighty feet west of the point where the deceased left the car, leading south across a field to or near to the house where she lived. The deceased and her companion, as

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soon as they got off of the car, turned and walked a few steps in a south-westerly direction until they reached the second track, when a passenger train from the east, which was ten or fifteen minutes behind time and running at the rate of thirty-five or forty miles an hour, struck them and both were killed. But a few seconds elapsed after they left the car before they were struck. The evidence tends to show that they did not look to the east after leaving the car. If they had looked they would have seen the approaching train, the track at that point being straight for a half a mile or more east of the place of the accident. There is no evidence that the conductor or other person connected with the train gave any instructions to passengers where to alight, or any warning of the approaching train; and evidence was given tending to show that no instruction or warning was given. The whistle of the passenger train was sounded just before the accident, but not in time to prevent it.

The only question of doubt in the case arises upon the claim that the deceased, in not looking to the east before attempting to cross the second track, was guilty of contributory negligence. The court charged in substance that the plaintiff could not recover unless the deceased exercised ordinary care and prudence under the circumstances, or if her negligence contributed to the accident, but refused to charge that her omission to look to the east was *per se* negligence. But the court did charge that if the deceased knew or had reason to believe that the passenger train was behind time, or that it might come along at any moment, then she was bound to look, and an omission to do so was negligence. The refusal of the court to charge that the omission of the deceased to look to the east before going upon the track was in law negligence, is sustained by the case of *Terry, Adm'r, v. Jewett* (78 N. Y. 338). That case does not interfere with the rule established by many cases, that a traveler on a highway is bound, before attempting to cross a railroad track, to look for approaching trains, and that an omission to do so is negligence. In *Terry, Adm'r, v. Jewett*, it appeared that the plaintiff's intestate had purchased at a station a ticket with the intention of taking passage on a train, and

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seeing the train approach she left the station-house before it had stopped, to go to the cars, and while passing over an intervening track, was struck and killed by a freight train moving in an opposite direction. She did not look in the direction of the freight train before going upon the track. If she had looked she would have seen it. This court sustained the recovery in that case. A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train. In this case the defendant received the deceased as a passenger. It stopped the train east of the regular stopping place of trains, for the convenience of its employees. But it was also the place for the alighting of passengers who might have taken passage in it. It gave no warning to the deceased of danger. It knew that the train from the east had not passed this point and was behind time. There was no direction to passengers not to get off on the south side, and nothing to indicate that it was improper to do so. If the deceased knew of the regular time for the eastern train to pass this point, she must also have known that it usually passed before the special train arrived. In view of the circumstances, we are of opinion that the case on the point of the negligence of the deceased was properly submitted to the jury, and that the court would not have been justified in withdrawing it from their consideration. The fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence; but her omission to do so was not in law decisive against a recovery.

We have examined the other points presented and they furnish no ground for the reversal of the judgment.

The judgment should be affirmed.

All concur, except EARL and FINCH, JJ., not voting, and RAPALLO, J., absent.

Judgment affirmed.

## Statement of case.

MARY MASTERSON, as Executrix, etc., Respondent, v. THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appellant.

A railroad corporation is not relieved from the duty imposed upon it by the General Railroad Act (sub. E, § 28, chap. 140, Laws of 1850) to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness" by the fact that a street railway company whose road runs along the highway is obligated to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to or duties imposed upon others.

Plaintiff's testator was, by the invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful and willful act." Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar the plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient.

*Coogrove v. N. Y. C. & H. R. R. R. Co.* (18 Hun, 329), *Barringer v. N. Y. C. & H. R. R. R. Co.* (18 id. 398), distinguished.

(Argued January 24, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff; entered upon an order made April 8, 1880, denying a motion for a new trial, and directing judgment on a verdict.

This action was brought to recover damages for the death of James Masterson, plaintiff's testator, alleged to have been caused by defendant's negligence.

Plaintiff's evidence was to the effect that the deceased was engaged as a mason at North Albany on the 24th of September, 1878. At the close of the day's work he and two others rode home to the city of Albany in a wagon driven by one

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Atwood, who was drawing bricks to the place where they were at work, and who invited them to ride. One of them sat on the seat in front with the driver, and the other two on a box in the rear, one facing to the front and the other, the deceased, to the rear. The driver drove down on the west side of Broadway in said city, until within a few rods of the railroad crossing, where he turned to the east side to avoid a truck, and then turned back to the west side of the street again, directly at the crossing. The defendant's road, composed of four tracks, crosses diagonally over Broadway. This course took the wagon across the railroad at a right angle. While passing over the second track, the wheels struck into a "hole in the track," which caused a *jar* that precipitated the deceased from the box on which he was sitting to the track and killed him. There is also a horse railroad company, The Albany and Watervliet Turnpike and Railroad Company, having two tracks on Broadway; the accident occurred at the intersection of these two tracks with those of the defendant.

The further material facts are set forth in the opinion.

*Hamilton Harris* for appellant. The injury must have been occasioned solely by the negligence of the defendant, and either by direct proof given by the plaintiff, or from the circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault which contributed to the accident, or the action is not maintained. (*Reynolds v. The N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; *Coriell v. The N. Y. C. & H. R. R. Co.*, 75 id. 330.) The deceased was bound to exercise such care and watchfulness as a prudent man, approaching and crossing such a place, would ordinarily exercise. (*Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72.) The horse railway company was bound to keep its tracks in good repair, and "at all times to keep the street and pavement within and between the rails of said tracks, and to the extent of two feet beyond and outside of said rails, in good and proper condition;" for a failure to do this, defendant being liable for such conduct, it could main-



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tain an action therefor against the horse railway company. (*Lowery v. Brooklyn C. & N. R. R. Co.*, 76 N. Y. 28; *Moore v. Goedel*, 34 id. 527.) While the driver's negligence may not be imputed to the deceased, yet the law forbids a recovery, even admitting that there was negligence concerning the crossing; not because deceased is chargeable with contributive negligence, but for the reason that the defect in the roadway did not cause the death. (*Cosgrove v. N. Y. C. & H. R. R. R. Co.*, 18 Hun, 329; *Barringer v. N. Y. C. & H. R. R. R. Co.*, 18 id. 398.)

*E. Countryman* for respondent. There was evidence of gross negligence on the part of defendant in allowing the planking between the rails to remain out of repair so as to render the crossing difficult and unsafe for vehicles passing along the street, which presented on this subject a proper case for the jury. (*Wasmer v. Del., L. & W. R. R. Co.*, 80 N. Y. 212; *McMahon v. Second Ave. R. R. Co.*, 75 id. 231; *Gale v. N. Y. C. & H. R. R. R. Co.*, 76 id. 594, 595; *Worster v. Forty-second Street, etc., R. R. Co.*, 50 id. 203; *Conroy v. Twenty-third Street R. R. Co.*, 52 How. 49.) It does not relieve the defendant from liability that the accident occurred at the point of intersection of its road with that of a horse railroad. If it was equally incumbent on both companies to keep the crossing in repair, either one is liable for omitting to perform his duty. (*Webster v. Hudson R. R. Co.*, 38 N. Y. 260; *Sheridan v. Brooklyn, etc., R. R. Co.*, 36 id. 39; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492; *Chapman v. N. H. R. R. Co.*, 19 id. 341; *Eyler v. County Comm'rs*, 49 Md. 258; *State v. Gorham*, 37 Me. 451; *Watson v. Tripp*, 11 R. I. 98; *Willard v. Newbury*, 22 Vt. 458; *Lowell v. Proprietors of Locks, etc.*, 104 Mass. 18.) A railroad company is required to restore a street intersected by its road "to its former state or to such state as not unnecessarily to impair its usefulness." (2 R. S. [6th ed.] 533, § 39, subd. 51; *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; *People v. Troy & B. R. Co.*, 37 How. 427; *Richardson v. N. Y. C. R. R. Co.*, 45

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N. Y. 846; *People v. N. Y. C. & H. R. R. Co.*, 74 id. 302; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594; *Wasmer v. Del., L. & W. R. R. Co.*, 80 id. 212; 10 Weekly Dig. 100, 101.) The question of contributory negligence was properly submitted to the jury. (*Weston v. N. Y. Elev. R. R. Co.*, 73 N. Y. 595; *Jetter v. N. Y. C. & H. R. R. Co.*, 2 Abb. Ct. of App. Dec. 458; *Weed v. Ballston*, 76 N. Y. 329, 333; *Stackes v. N. Y. C. & H. R. R. Co.*, 79 id. 464; *Johnson v. H. R. R. Co.*, 20 id. 65; *Conroy v. Twenty-third Street R. R. Co.*, 52 How. 49.) It is a matter of right to have the issues of negligence submitted to the jury, when they depend on conflicting evidence, or on inferences to be deduced from a variety of circumstances, in regard to which there is room for a difference of opinion among intelligent men. (*Wolfkiel v. Sixth Ave. R. R. Co.*, 38 N. Y. 49; *Hart v. Hudson R. Bridge Co.*, 80 id. 622; *Weber v. N. Y. C. & H. R. R. Co.*, 58 id. 451; *Bernhard v. R. & S. R. R. Co.*, 1 Abb. Ct. of App. Dec. 131.) The deceased was a voluntary passenger, riding with the consent of the driver, but had no connection with or control over him, and the negligence of the driver, therefore, was not imputable to him, and is no defense to the action. (*Dyer v. Erie Ry. Co.*, 71 N. Y. 228, 234; *Robinson v. N. Y. C. & H. R. R. Co.*, 66 id. 11.)

DANFORTH, J. As to the general principles of law applicable to this case there is no room for argument. It was the defendant's duty to keep its road-bed at the street-crossing in such condition that a traveler could pass over it in safety, or failing in this, make compensation to a person injured by reason of its omission, unless he was so deficient in reasonable and ordinary care that he brought the accident upon himself. (Laws of 1850, chap. 140, § 28, sub. 5; *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214; *Gale v. N. Y. C. & H. R. R. Co.*, 76 id. 594.) That the plaintiff's intestate was lawfully upon this crossing and there came to his death, is not denied. That he was shaken from the wagon, as its wheels passed into a hole within the defendant's tracks, was

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well proven, and the trial judge, in language to which there was no exception, instructed the jury that the plaintiff could not recover unless he established, to their satisfaction, first, that the death was occasioned by the wrongful act of the defendant, either by some omission to do an act required of it, or by some positive wrongful act; and, second, that there was no negligence on the part of the deceased contributing to the injury. There was evidence upon both propositions. As to the first, the crossing is well described by the defendant's counsel "as the most difficult and dangerous place in the whole city." It required, therefore, from the defendant a great degree of care and vigilance, to the end that vehicles might not be obstructed and their passage delayed. There is evidence that such care was not exercised. The jar or shock occurred while the wagon was between the defendant's tracks. It was caused by a hole six to eight inches deep in the track between the plank and the rail. Of its severity the driver who sat in front with a companion says: "It shook us so it most shook us off the seat. We all grabbed together." It stopped the wagon for about a second, not stock still. "The planks were all so broken" that the route selected was "to avoid those holes." It is shown by other witnesses that the track at this point had been in bad condition for some days. By one that "the plank had been out for about two weeks;" by another "that the planking was in a pretty rough condition along the joints, what they call the frogs; at most of them the planks were worn off; one plank was clear out; there were eight or ten breaks; the planks ran in the direction of the steam tracks;" and by other witnesses the bad condition of the planking at this crossing for two weeks before and at the time of the accident, "its surface uneven;" "holes in it;" one place "six to eight inches deep." There is also testimony from the defendant. The jury may have found that it did not aid the defendant's case; that the care used by it at that crossing was not equal to the emergency; that the driver was not relieved so much as he should have been from the jeopardy and danger to which, under the most favorable circumstances, he would be exposed in crossing the tracks.

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In short, that the highway or street at that point was not kept by it in a fit and safe condition for public use. There is the testimony of its superintendent of repairs, having charge of this crossing and many other places. His duty, as defined by himself, was to inspect the road and if defects were found, repair them. "On the day of this accident," he says, "the plank was some considerably worn," one in particular more than the others. On the next day he noticed that it was out, and then directed it to be replaced. He says, "about one thousand teams pass that crossing in twenty-four hours." There are many tracks, frequent passing of trains. He describes the method of planking, the frequency of reparation, the durability of the material. There was also the track foreman. On the 23d of September, and also the morning of September 24th, he says he found a plank out, others much worn, but he made no repairs until after the accident. He did on the 25th of September. It was also shown that this witness testified before the coroner upon the inquest on the body of the person killed, that "he received notice to repair the track before the accident happened." It is not impossible that the jury may have thought some negligence was proven even upon the statements of these witnesses, when considering the risks offered to property and human life by the methods of the defendant's business and its interference with the highway. They might well doubt whether it was complying with its statutory obligations to restore the street to such state "as not unnecessarily to impair its usefulness." (Laws of 1850, *supra*.) The perishable material used, the frequency or delay in reparation, the manner of doing it, were all subjects for their consideration. So was the other question. Judged by the result and the evidence now before us, it is apparent there was danger to be avoided, yet the intestate was rightfully traveling the public street, and without notice to the contrary, was justified in assuming that it was safe to do so. There is nothing to show that he was not intent upon his own security, or that there were any precautions omitted by him which a prudent person would have taken. But both questions were for the jury, and

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the evidence was sufficient to put them to the answer. The learned counsel for the appellant also asserted as ground of nonsuit, that "this injury was not caused by any negligence of the defendant, but if there was any negligence in regard to these tracks, it was the negligence of the Albany & Water-vliet Horse Railroad Company." This company was charged with the duty of keeping the street between the rails of its track in repair, and its tracks crossed those of defendant at the point where the accident occurred. In view of the circumstances to which I have already adverted, it is clear that this could not be maintained as matter of law. The statute imposed upon the defendant a duty in regard to the street, its performance was assumed, and there was at least an apparent violation of it. There was, I think, no error in denying the motion for a nonsuit.

Were the jury misinformed or left in ignorance as to the law? The defendant's counsel asked the court to charge that "if the driver's negligence was the proximate cause of the jar which caused the injury, the plaintiff cannot recover." The trial judge replied: "I will not alter my charge in that respect. I did substantially cover that ground." The learned counsel repeated the request, and the court again declined to alter its charge. In each case there was an exception. The testator was a mason, employed on the day in question at North Albany. One Atfield was, with his wagon, drawing bricks to the same place, and at the close of the day allowed the testator and two others to ride with him to Albany. In its charge the court had called attention to these facts; the conduct of Atfield, the defendant's claim that Atfield was negligent, and said: "It is not claimed that between Atfield and the deceased the relation of master and servant or principal and agent existed; he was invited to ride, and I feel bound to say that the facts do not show a condition of things that would warrant the jury in saying that the plaintiff cannot recover, even if they should find Atfield was negligent; they were not engaged in any joint employment; and whatever doubts may have existed as to what the law was, years ago, it seems now to be settled that,

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in a case of this character, assuming that Atfield was a competent driver and sober man, and no reason which deceased could discover why he should refuse to ride with him, I do not think that, although there might have been carelessness on the part of Atfield in driving, that would defeat a recovery, unless you should consider there was a willful act upon the part of the driver and the death was caused by his wrongful and willful act." The argument of the learned counsel for the appellant was thorough and earnest, but in support of the exception we find no authority. The charge in this respect was sufficient and within the decisions of this court, substantially in the language used by MILLER, J., in *Dyer v. Erie Railway Co.* (71 N. Y. 228), and within the principle of that case and that of *Robinson v. N. Y. C. & H. R. R. R. Co.* (66 N. Y. 11). The request was properly denied. If, under any circumstances, it could be regarded as embracing a rule of law, they do not exist here. The negligence of the driver consisted, it is said, in passing the track at one point rather than another. It may be that if he had chosen some other, the accident would not have happened. But the omission to do so does not make his act the proximate cause of the jar in any such sense as excludes the defendant's negligence from being also a proximate cause. It must be conceded that if he had driven elsewhere there would have been no jar from that obstruction; but also it must be seen that if the obstruction had not existed there would have been no jar. The cases, *Cosgrove v. N. Y. C. & H. R. R. R. Co.* (13 Hun, 329); *Barringer v. N. Y. C. & H. R. R. R. Co.* (18 id. 398) lend no support to his contention. There the defendant was not in fault and had omitted no duty. The accident occurred because Barringer could not control his horse; and both cases are put upon the ground that the defendant's negligence did not cause or contribute to the injury. If the request had been so qualified, a different question would have been presented. The learned counsel for the defendant asked the court to charge that "if the defect in the horse railroad tracks and planking caused the injury, the plaintiff cannot recover," and the court said: "Yes, if it is a defect

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in the horse railroad that these parties are in no way responsible for." There was an exception; but it needs no discussion, for if a defect existed, and for it the defendant was responsible, they would be liable for any injury arising therefrom. The request was then made for a charge "that the defendant is not responsible at all for the horse railroad," and the court said: "Not for the condition of its rails, perhaps, but I decline to charge so; it might be held responsible for any defect in the crossing which was between the rails of the defendant's road. What I charge is that, no matter what may be the measure of care or the responsibility of the horse railroad, still the defendant, having its tracks there at this crossing, must keep the crossing between the rails in such a way as not unnecessarily to impair or render dangerous crossing over these tracks, although it may be the crossing over the track of both the horse railroad and steam railroad at the same place." To this the defendant's counsel excepted. There was, I think, no foundation in the evidence for such a request. It is clear that the accident occurred at the crossing, upon land occupied by the defendant and between its tracks. The duty of maintaining it in proper condition was a corporate duty, in no way limited or restricted by privileges granted to or obtained by others.

The city had a duty to perform. The street railroad also. An action might perhaps lie against either for the omission of duty leading to the death of the testator, but because this crossing had many guardians, the obligation upon the defendant was in no particular diminished. Whatever rights have been granted by statute or by ordinance to others, the duty of the defendant is paramount, and it owes obedience to the statute by which it came into existence. The evidence shows no act done by the street railroad. The planks at the crossing were placed and replaced by the defendant. The crossing was seen to by it after such manner as it chose, but in whatever manner without interference from the street railway or regard to it. We find also in the statute introduced in evidence by the defendant (Laws of 1862, chap. 223, § 3) relat-

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ing to that railway, a clause declaring that such company shall not "cross or run over the track of the New York Central Railroad Company, unless on terms to be agreed upon between the two companies," or "in case of disagreement between them," by the Supreme Court. We are not to suppose in the absence of proof that due provision has not been made for the protection of the defendant from the consequences of any act or omission on the part of the street railway. But however that may be, there is nothing in any statute to which our attention has been called, and there is no principle of law which relieves the defendant from the performance of a duty upon which the lives of citizens depend and which should be performed exactly and without abatement. It certainly could by no act of its own relieve itself from this duty and liability (*Storrs v. City of Utica*, 17 N. Y. 109), and it has not been modified or dispensed with by the legislature. The license of the second corporation may have added another party to the negligent omission, but it did not release the defendant from the duty laid upon it by law, or transfer the consequences of its non-performance or negligent performance of that duty. The plaintiff might perhaps have had an action against the other or perhaps against both jointly. (*Illidge v. Goodwin*, 5 C. & P. 190; 24 Eng. C. Law, 272; *Lynch v. Nurdin*, 1 A. & E. [N. S.] 29; 41 Eng. C. Law, 422; *Chapman v. N. H. R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. N. H. R. R. Co.*, 20 id. 492.) Upon the facts found by the jury, it was at all events well brought against the defendant.

The defendant's counsel also asked the court to charge that if this injury arose and was caused by the rails of the street railroad company, that is, if it was caused by the wheel getting between the plank and a loose rail of the street railroad, then defendant is not responsible.

The court: "If it was caused by the loose rail of the horse railroad company, of course your company probably would not be responsible for that, if it was in consequence of the rail."

No defect was shown to exist in the rails of the street rail-



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way company. No one of them was shown to be loose. The difficulty was with the roadway and the planking. There was no foundation for the request made, and the charge given in answer to it was favorable to the defendant. But whatever duty was imposed upon the street railway company it did not relieve the defendant from liability for its own negligence, or for want of care in keeping up and maintaining the street in proper condition. If the street railroad has erred in the omission to perform any duty in respect to the crossing, the law gives a remedy, but the defendant is not thereby released from its obligations to keep the crossing safe for public travel. For the omission to perform those obligations the judgment appealed from has been rendered, and it should, I think, be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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WATSON HAM, as Administrator, etc., Appellant, v. EDMUND H. VAN ORDEN, Trustee, etc., Respondent.

The will of W. gave his money and securities remaining after payment of debts, etc., one-half to his son E., one-fourth to his daughter J., and one-fourth to E. in trust, to pay the interest annually to the testator's son W. during life, and after his death the same to be divided equally among his children if he left any him surviving; if he left no child or children him surviving, then the one-fourth was given to E. and J., in equal proportions. *Held*, that E. and J. took an estate in expectancy in the one-fourth held in trust for W. (the son) (1 R. S. 723 § 9), which was alienable. (1 R. S. 725, § 35.)

The testator's son W. died leaving no issue. In an action brought by J. to recover her portion of the trust estate, it appeared that after the death of the testator, the three children met together, settled and set apart the amount of the trust fund, and E., as trustee, received the securities and money so set apart, and as the referee found "as part of the agreement for the final settlement of the affairs of the estate and the division of its assets," J. and E. executed and delivered to their brother W. an instrument in writing, whereby, for the expressed consideration of one dollar, they did "jointly and severally release, dis-

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charge and convey" unto him all their "right, title and interest, claim and demand of, in and to the trust fund given and bequeathed" by the will of their father. *Held*, that the finding showed a good and sufficient consideration for the instrument; and that it was valid and effectual to transfer plaintiff's interest in the trust fund.

Also *held*, that even had there been no consideration, the instrument having been executed, as was found, voluntarily and without fraud, was valid as a gift.

(Argued January 28, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 4, 1880, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was commenced by Jane C. Ham, and she dying, was continued by Watson Ham, as her administrator. The complaint states the death of one Wessel T. Van Orden in January, 1871, leaving a will which was duly admitted to probate, and contained among others these words; "I give, bequeath and direct as follows: that all my mortgages, bonds, notes and money remaining, after paying my just debts, funeral expenses, and the legacies heretofore mentioned, be divided and disposed of as follows: I give and bequeath unto my said son Edmund H. Van Orden one equal undivided half part thereof, I also give and bequeath unto my said son Edmund H., one equal undivided fourth part thereof. In trust nevertheless to be invested by him upon good security and to pay the interest on the same annually to my son Wessel T. B. Van Orden during his natural life (except thirty dollars annually hereinafter bequeathed to my wife), and after the death of the said Wessel T. B. Van Orden the same to be divided equally among the child or children of said Wessel T. B. should he leave any him surviving: In case the said Wessel T. B. shall leave no child or children him surviving, then I give and bequeath the said one-fourth part of my mortgages, bonds, notes and money unto my son Edmund H., and my daughter Jane C., in proportions, share and share alike. I give and bequeath unto my daughter Jane C. (wife of John

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Ham) the remaining one equal undivided fourth part thereof :” that the defendant qualified as executor, accepted the trust created by this will, and took into his possession the mortgages, bonds, notes and money so bequeathed to him in trust, and has ever since acted as such trustee; that on the 11th day of August, 1877, Wessel T. B. Van Orden, named in the clause of said will above recited, died without issue, and thereupon the said Jane C. Ham became entitled to one-half of the said one-fourth part of said mortgages, etc., so bequeathed in trust to the defendant; but although demanded of him, he has refused to pay or transfer it, or any portion of it, to her. The relief demanded is appropriate to these averments. The defendant by answer set up that Jane C. Ham (the then plaintiff), on or about the 21st day of February, 1871, for a valuable consideration did in writing release, discharge and convey unto Wessel T. B. Van Orden, “ the *cestui que trust* and beneficiary named in said complaint, all the right, title, claim and demand of the said plaintiff, Jane C. Ham, of, in and to the trust fund given and bequeathed by the last will and testament of Wessel T. B. Van Orden, first named in said complaint, for the use and benefit of said Wessel T. B. Van Orden (the said *cestui que trust* or beneficiary) in the execution of which said conveyance, release or assignment the said defendant Edmund H. Van Orden joined in his individual capacity, and not as trustee, and in like manner released, discharged and conveyed his interest in said trust fund, whereupon said Wessel T. B. Van Orden became seized and possessed in his own right of said trust fund mentioned in said complaint and of the whole thereof,” subject to certain contingencies not now important; “ that on the 20th of November, 1871, the said Wessel T. B. Van Orden, for a valuable consideration, by an instrument in writing, assigned and transferred unto one Gilbert R. Spaulding, his heirs, etc., the sum of \$9,800 of said trust fund, to be paid to him within three months after the death of said Wessel T. B. Van Orden; that at the time of making such last-mentioned assignment the said Spaulding relied upon the release and conveyance hereinbefore firstly set forth, the same being recited in full in the assignment to said

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Spaulding, and in consideration thereof, and in the last above-mentioned assignment, said Spaulding released and discharged the said Wessel T. B. Van Orden from an indebtedness then due and owing from said Wessel T. B. Van Orden to said Spaulding, amounting to a sum greatly in excess of said sum of \$9,800; that afterward and on or about the 6th day of January, 1877, said Gilbert R. Spaulding, for a like consideration, duly sold, assigned and transferred and set over all his right, title and interest of, in and to the said trust money, funds and property, unto the above-named defendant, individually and not as trustee, whereupon he became and still is the lawful owner and holder of said trust money fund and property to the extent of \$9,800." The defendant also by his answer set up that Wessel T. B. Van Orden died on the 11th of August, 1877, leaving a will which, upon notice to the plaintiff, Jane C. Ham, was duly admitted to probate, and by which the said Wessel devised to his nephew, W. T. B. Van Orden, Jr., all his real and personal property of every name and nature, and appointed this defendant executor of said will, and he as such qualified and received letters testamentary under the same; that the said Wessel T. B. Van Orden, Jr., is still living. He also denies any indebtedness to the plaintiff individually or as trustee. To this answer the plaintiff replied, denying that any consideration was given to her for the release aforesaid, or that it was delivered to Wessel by her direction or assent, or with her knowledge, and averring that "it was procured by her brother, the said Wessel T. B. Van Orden, deceased, and the defendant herein, to be signed by her, by fraud, deception, undue influence, coercion and connivance on their part," stating the particulars thereof, and that she was thereby induced to sign the same.

By consent of the respective parties the issues in the action were sent to a referee to hear and determine, who made a report in which he stated the facts in regard to the death of the first Wessel T. B. Van Orden and the provision of his will substantially as above set out, and further, so far as is material to any question arising on this appeal:

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"that on the 21st day of February, 1871, the said three children of the testator" (Jane C. Ham, the plaintiff, Wessel, the beneficiary, and Edmund H. Van Orden, the defendant) "met together and settled and determined the amount of the mortgages, bonds, notes and money belonging to his estate, remaining after making the payments specified in the will, and the amount of the trust fund to be disposed of as above specified; that the amount of said trust fund was ascertained to be, and was settled and agreed upon at the sum of, \$19,806.99; that that amount was agreed upon and set apart as, and for said trust fund, and the defendant accepted said trust and received the securities and money so set apart as such trust fund. That upon the said 21st day of February, 1871, *and as a part of the agreement for the final settlement of the affairs of the estate and the division of its assets*, the said Jane C. Ham and defendant executed an instrument in writing, of which the following is a copy, and delivered the same to their brother, Wessel T. B. Van Orden, mentioned therein, to wit:

'For and in consideration of the sum of \$1, to us in hand paid by Wessel T. B. Van Orden, we do hereby jointly and severally release, discharge and convey unto said Wessel T. B. Van Orden all our right, title, claim and demand of, in and to the trust fund given and bequeathed by the last will and testament of Wessel T. B. Van Orden, deceased, for the use and benefit of said Wessel T. B. Van Orden.

Dated *February* 21, 1871.

EDMUND H. VAN ORDEN.  
JANE C. HAM.'

"That said instrument was executed freely and voluntarily on the part of said Jane C. Ham, with full knowledge of its contents, and without any fraud, deception, undue influence, coercion or conspiracy on the part either of said defendant or Wessel T. B. Van Orden, his brother, inducing him thereto. That at the time of the death of said Wessel T. B. Van Orden, first above mentioned, and at the time of the execution of said instrument by said Jane C. Ham and defendant, their brother, said Wessel T. B. Van Orden, second above-mentioned,

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was unmarried and had no child or children, and that he died on the 11th of August, 1877, leaving no child or children him surviving, and that from the time of the death of his father up to the time of his own death, no child was born to him." And as conclusions of law the referee found :

" 1. That in and by the provisions above quoted of said last will and testament of Wessel T. B. Van Orden, first, the said Jane C. Ham, upon his death, took an estate in expectancy, or future estate in said trust fund, which was alienable.

" 2. That in and by said instrument above set forth, executed by said Jane C. Ham, she assigned and transferred said estate and all her right, title and interest in and to said trust fund to her brother, Wessel T. B. Van Orden, second.

" 3. That at the time of the commencement of this action and at the time of her death the said Jane C. Ham had no right, title or interest whatsoever in and to the said trust fund.

" 4. That defendant is entitled to judgment dismissing the complaint with costs." Upon this report judgment was entered.

*O. M. Hungerford* for appellant. The finding that the release was "freely and voluntarily" executed and as a part of the agreement for the final settlement of the affairs of the estate is not conclusive on this court. (35 N. Y. 587-595.) The release was not binding as a gift, Mrs. Ham not having been apprised of its effect. (20 Md. 151.) The referee erred in going beyond plea and evidence. (1 Ves. 628; 2 Sch. & Lef. 500; 2 Johns. Ch. 34-43; 8 Cl. & Fin. 374; 1 Harris & Gill, 175, 203.) Defendant having by his answer sought to support the transfer as a sale for a valuable consideration cannot sustain it as a gift. (8 Clark & Fin. 370, 401; 3 Md. Ch. 401; 1 Harris & Gill, 196, 203.) The transaction was not complete so as to be binding as a gift. (*Hoghton v. Hoghton*, 11 Eng. L. & Eq.) Sales of a reversionary interest to be valid must be for a fair value. (63 N. Y. 657; Story's Eq., §§ 336-337 b.) There was concealment and imposition. (L. R., 5 Eng. & Irish App. 618.) Equity will not tolerate a transaction based on a "badge of fraud." (16 Wend. 473; 11 Wheat. 213; 1 Johns.

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Ch. 478; 78 N. Y. 388; 8 Cow. 434; *Ahern v. Hogan*, 1 Drury's Ch. 310.) The quit-claim was in no sense any "part of the settlement." (4 Russell, 36, 42, 54.) The finding that the quit-claim was part of the settlement being based simply on Wessel's threat rests on a palpably unfounded and untenable claim. (44 Barb. 652; 78 N. Y. 336.) The quit-claim then was extorted and coerced. (23 Kans. 476; L. R., 7 Ch. App. 104, 108.) Settlements between members of the same family must be conducted with all "imaginable fairness." (1 Sch. & Lef. 226; 3 Swanst. 470; 2 DeG., J. & S. 28, 42, 119; 2 Patterson's Scotch App. 173.) We cannot speculate on what Mrs. Ham might have done had a full and fair disclosure been made. (7 H. of L. Cas. 750, 759.) Wessel had no right to assume that the fact of his indebtedness was immaterial if by any possibility it could have influenced his sister. (2 Bligh, 348; 1 DeGex, McN. & G. 707; 2 Pat. Scotch App. 1735.) There were no disputes and so no case was made for a family compromise. (4 Russell, 53-55; 8 Cl. & Fin. 347, 401.) Had there been it must have been reasonable and there must have been a full disclosure. (2 DeG., F. & J. 359; 3 Swanst. 472; 3 Cow. 568; L. R., 20 Eq. Cas. 708.) The quit-claim was void if the signing of it was induced by threats. (6 H. of L. 48, 49; 45 Ga. 598; 11 Eng. L. & Eq. 34, 138; 31 Barb. 33; 57 id. 453; L. R., 7 Ch. App. 338, 104-8; 2 Atk. 58-60; 3 Wall. 66; 3 Cow. 521; 2 Sch. & Lef. 484-486; 23 Kans. 476; L. R., 2 App. Cas. 215-232; 2 White & Tudor, part 2, pp. 1195-1250; 32 Beav. 628, 631; 31 N. J. Eq. 600; 71 N. Y. 158-159.) The attorney employed by the estate should have seen that Mrs. Ham understood the transaction. It was for defendant to show she had competent and independent advice. (30 Beav. 251; 23 id. 291; 15 id. 234, 244, 248; 32 id. 631, 632; 2 Y. & C. 117; L. R., 7 Eng. & Irish App. 463-471; 5 H. of L. 663; 8 Cl. & Fin. 381, note; L. R., 1 Ch. App. 252, 257, 261, 262; 7 id. 338-339; 33 Md. 193; 8 Irish Eq. 632; 11 id. 386, 404, 407; *Gibson v. Russell*, 2 Y. & C. 116; 11 Hun, 413; L. R., 2 Ch. App. 544; 6 Ves. 278; L. R., 1 Eq. Cas. 541; L. R., 2 Ch. App. 62; 7 id. 104-108; 3 Cow. 573.)

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Mrs. Ham's rights were fixed under the will and exhibits and if induced by mistake, ignorance, threats, art, deception or in any way to give up a portion of her property on a compromise, this court will relieve her. (1 Sim. & Stu. 564; L. R., 5 Eng. & Irish App. 618-623; 73 N. Y. 501; L. R., 2 App. Cas. 232.) The quit-claim does not represent the real transaction, it is unsupported by any proof. (72 N. Y. 400; 71 id. 159; 31 N. J. Eq. 600; 32 Beav. 630.) The court will exercise no power in favor of a trustee who turns speculator. (1 Johns. Ch. 478; 78 N. Y. 388; 4 How. [U. S.] 555-557; 82 Ill. 28.) The quit-claim is clear and unambiguous and hence its operation becomes a matter of law. (49 N. Y. 395; 89 Penn. St. 346; 20 Barb. 527; 31 N. J. Eq. 599-601.) The concluding words of the quit-claim should not, under all the circumstances, be construed as surplusage. (42 Penn. St. 386; 44 Cal. 253; 21 Pick. 507; 30 N. J. L. 510-518.) Intention has no place as a matter of inquiry. (25 N. J. Eq. 413; 5 Den. 694-702; 5 Cush. 63; 31 N. J. Eq. 600-601; 10 Pet. 211-213; 2 Pick. 365; 65 N. Y. 461.) Neither the fund itself nor any particular interest in it is quit-claimed. (1 N. Y. 242-247; 11 How. [U. S.] 322; 21 id. 240; 4 Sawyer, 526; 39 Mo. 566; 14 Kans. 148.) Such an instrument as this passes no more than a present right, a title *in esse*. (9 Cow. 18; 3 Wheat. 348; 23 N. Y. 531-532; 2 Barn. & Adol. 278; 2 Curtis, 444; 12 Pick. 46-67.) A quit-claim always implies a doubtful title. (4 Minn. 292; 14 Ill. 305-308.) The instrument was not properly drawn. (65 N. Y. 461; 5 Den. 694-702; 23 How. [U. S.] 127.) Even if value had been paid, or as part of the settlement, it was not available to pass the fund. (30 Mich. 300; 76 N. Y. 452; 11 Wall. 232.) Mrs. Ham had no transferable interest. (7 H. of L. 703; 16 N. Y. 95; 47 id. 396; 67 id. 352; 1 Phil. Ch. 342; *Everitt's Case*, 29 N. Y. 39; *Warner's Case*, 76 id. 133; 71 id. 98; 5 id. 125-134; 3 P. Wms. 300; 63 N. Y. 233; 2 Bland. Ch. 264; 12 Hun. 604; 75 N. Y. 73; 4 Keyes, 346; 30 Ohio, 288; 45 How. Pr. 206; 2 Patterson's Scotch App. 1537; L. R., 4 Eq. Cas. 372.) Defendant should have first surrendered



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what he got as trustee and then brought his action as an individual. (3 Pet. 55; 30 Barb. 641; 9 Hare, 222; 3 How. [U. S.] 38; 2 Blackf. 44; 5 Binney, 138-148; 66 N. Y. 555; 18 B. Monr. 466; 17 N. J. Eq. 557; 38 N. J. L. 522-523; 44 N. Y. 240.) The attempt on defendant's part is a mere "scheme," fraudulent in equity. (11 Hun, 413-426; 17 id. 197.) A trustee cannot buy in after he has accepted his trust. (*Davis' Case*, 55 Miss.) This was an executory transaction. The title and possession remained in and with the trustee. (1 T. & R. 445.) It was an incomplete gift at most. (30 Beav. 19-25; 2 Cal. Cas. 183-187; 1 Johns. Ch. 240; 10 N. Y. Weekly Dig. 137; 5 Dana, 107; 35 Ala. 637; 52 N. Y. 368; Leake's Dig. Law of Contracts, 615, note; 44 N. Y. 35; 76 id. 452.) The referee erred in rejecting plaintiff's offer of proposed exhibit two. (Greenl. on Ev., §§ 393-395; 1 Ves. 505; 3 Phil. on Ev. 1227; 16 Johns. 193; 40 Barb. 528; 2 Seld. 272; 23 Kans. 475-476; L. R., 7 Ch. App. 104-108; 2 Sch. & Lef. 484-485; 3 Cow. 572-576; 1 P. Wms. 117; L. R., 2 App. Cas. 232; 1 Sch. & Lef. 222.) The referee erred in rejecting plaintiff's offer to show Mrs. Ham's subsequent declarations offered and intended to illustrate her understanding of the real object of the quit-claim, and to show also how she understood Wessel in the matter of the Spaulding indebtedness. (32 Beav. 628; 2 Ala. [N. S.] 571, etc.; 5 Barb. 543-545; 8 Watts & Serg. 96-98.) Such declarations, under a plea of fraud, are *dehors* the whole paper. (5 Barb. 543-545; 13 Gratt. 705-715; 8 Watts & Serg. 96-98.) The quit-claim, having been executed as a favor, although absolute on its face, cannot be sustained. (5 Barb. 543-545; 1 Busbee's [N. C.] Eq. 273; 2 Ves. Sr. 626; 18 B. Monr. 452-456; 29 Cal. 490; 1 Dallas, 426; 17 Hun, 197-198, etc.) The court relieves against such deeds when relied upon as absolute, on the ground of fraud, and equity allows evidence *dehors* the deed, as tending to show the real object. (2 Ala. [N. S.] 596, 671; 60 N. Y. 397; 13 Cal. 126-127; 46 id. 648; Otto, 336.) Fraud in equity can be traced by circumstances. (45 Barb. 448; 61 Ala. 281; 58 Miss. 201; 44 Ind. 211; 46 Ill. 256-257.)

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Mrs. Ham's declarations would also illustrate her understanding of the quit-claim and perhaps the motive that impelled her to sign it. (24 Conn. 94; 2 Molloy, 361; L. R., 2 App. 215, 232.) The referee erred in rejecting plaintiff's offer of a copy clause in a proposed decree drawn by Lawton, which clause was evidently intended to confirm the quit-claim. (6 Binney, 481; 4 Beav. 144; 1 Ves. Sr. 505; 22 Beav. 628-630.) It tends to prove that Wessel and defendant, if not Lawton, felt that some confirmation of the release was in order. (8 Hare, 262; 8 How. [U. S.] 206; 4 Brown's Par. Cas. 241-242; 6 N. Y. 274.) The referee erred in rejecting the letter offered by plaintiff, written by Lawton, to Ham. (32 Beav. 628-630.) It was also error to reject the letters written by Ham to defendant at Mrs. Ham's request. (47 Ga. 68.) The referee erred in permitting defendant to testify as a witness against the administrator. He was not competent under the 829th section of the Code. (67 N. Y. 495; 72 id. 602; 10 Weekly Dig. 6-7.)

*Rufus W. Peckham* for respondent. If there were any uncertainty as to the meaning of the language of the release, the surrounding circumstances may properly be looked at. (*Griffith v. Hardenburgh*, 41 N. Y. 464; *Knapp v. Warren*, 57 id. 668; *White v. Hoyt*, 72 id. 505.) The words of the conveyance should be taken most strongly against the grantor. (*Hathaway v. Power*, 6 Hill, 453.) The estate of Mrs. Ham was a vested remainder at the time she conveyed it. (*Lawrence v. Bayard*, 7 Paige, 70; *Sheridan v. House*, 4 Abb. Ct. of App. 218; *Moore v. Littell*, 41 N. Y. 66; *Woodgate v. Fleet*, 44 id. 1; *Smith v. Scholtz*, 68 id. 41, 61.) If there is a present capacity to take, the estate is vested in interest, though it may not be certain that such person will be living or qualified to take at the actual cessation of the prior estate. (*Vanderheyden v. Crandall*, 2 Den. 1, 18; *Matter of Trustees, etc.*, 31 N. Y. 574, 589.) With but one exception, not important here, the same rules apply to the descent and alienation of personal property as apply to real property. (1 R. S. 773, §§ 1, 2.)

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Opinion of the Court, per DANFORTH, J.

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Future estates are vested or contingent, but are also expectant. (1 R. S. 722, § 7 *et seq.*) Expectant estates (in which are included both vested and contingent remainders) are by the express terms of the statute made descendible, devisable and alienable, in the same manner as estates in possession. (1 R. S. 725, § 35; 2 *id.* [6th ed.] 1103, § 35; *Savage v. Pike*, 45 Barb. 464, 469; *Smiley v. Bailey*, 59 *id.* 80.) Contingent remainders, even by the English common law, are transmissible, like vested interests. (*Winslow v. Goodwin*, 7 Metc. 363, 377; *Gardner v. Hooper*, 3 Gray, 298, 403; *Stover v. Eycleshimer*, 3 Keyes, 620; 68 N. Y. 41, 61; *Miller v. Emans*, 19 *id.* 384.) As the conveyance operated immediately as an executed, as distinguished from an executory, instrument, no consideration was needed to support it. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 683; 2 Bl. Com. 441; *Bunn v. Winthrop*, 1 Johns. Ch. 329, 336; *Richardson v. Mead*, 27 Barb. 178; *Robertson v. Gardner*, 11 Pick. 146-150; *Soverlye v. Arden*, 1 Johns. Ch. 240; *Cruger v. Cruger*, 5 Barb. 225, 235.) The decision of the referee was sufficiently favorable to plaintiff, in holding that the burden was on the defendant of showing that the instrument, properly acknowledged, was in its nature and effect understood by the party signing it. (*Onoes v. Cornell*, 75 N. Y. 91-99.) The foundation of equitable jurisdiction in cases of a hard, an unconscionable bargain, and advantage taken of the necessities of an heir, lies in "weakness on one side, usury on the other, or extortion or advantage taken of that weakness." (L. R., 8 Ch. App. 484, *supra*; L. R., 2 *id.* 542; 1 Story's Eq. Jur., §§ 339, 340, note.) The referee was correct in his rulings in relation to the admissibility of the evidence of defendant, limited as it was by the referee. (*Cary v. White*, 59 N. Y. 336; *Brague v. Lord*, 67 *id.* 495; *Kraushaar v. Meyer*, 72 *id.* 602.)

DANFORTH, J. So far as the questions of fact involved in this case depend upon conflicting evidence, the findings of the referee cannot be reviewed here. They have been examined by the Supreme Court and found satisfactory. As to

those questions, therefore, the judgment appealed from is final. Among those most material to the plaintiff's case is the issue raised by the answer and reply involving the validity of the release or quit-claim executed by Mrs. Ham. That it was, in fact, executed by her and by her delivered, is apparent. Was its execution and delivery induced by fraud or other influence set out in the reply? If there is evidence tending to show that it was, there are many circumstances to the discredit of the plaintiff's principal witness, and other circumstances and the testimony of witnesses to the contrary. By the latter the referee and General Term have been convinced. The appellant's counsel, however, lays much stress upon the fact that the pleading or answer of the defendant alleges, for the execution of the release, "a valuable consideration," and contends that neither the evidence nor the finding of the referee is to that effect, and more than this, that it was, in fact, disproved. But in what respect does the finding of the referee differ from the allegation of the defendant? He finds a good and sufficient consideration, one moving to the benefit of the plaintiff and of substantial value. He was not asked for other or further findings, as for instance in what way the agreement for the adjustment or settlement of the estate was for her advantage. It accords with nature and the fitness of things, that a speedy adjustment of the rights of several persons in property should be made; and as in this case the questions were between brothers and sister, it is not difficult to see that each might desire, by a fraternal arrangement, to prevent controversy and dispute over the estate of their father, and put an end to doubt or indisposition before it widened into strife and enmity. The release recites a consideration of \$1; the pleader averred a valuable consideration; the referee finds that it took its place in the "final settlement of the estate and the division of its assets." The plaintiff by no means shows that it was without consideration, but urges, in the language of one witness, "that no money or property was transferred, or consideration of a pecuniary or valuable character given when the

paper was signed." This was matter for the trial court, and with other evidence to be considered. Upon the whole the conclusion was expressed in the finding I have referred to. It is quite sufficient. It is well settled also that the acknowledgment of the receipt of the consideration expressed in a deed is open to explanation (*McRea v. Purmort*, 16 Wend. 469), and that it may be resorted to even to uphold a conveyance when attacked by creditors, even if it discloses a different consideration than the one alleged. (*McKinster v. Babcock*, 26 N. Y. 378.) There is also evidence to sustain the finding.

But assuming it to be a gift, I find no ground of invalidity. If there was no fraud or deceit, no unfairness practiced against the giver, why should it not stand? The interest described and intended to be transferred had been a voluntary gift to her made by the father at his pleasure, subject to conditions — the death of Wessel without children — and liable to be defeated if he had issue. She had the same right to do with it as she chose — bestow it upon her brother as a favor, or make it a factor in the adjustment of the estate or its amicable division. The argument submitted by the appellant's counsel upon this branch of the case is well prepared and fortified by authorities carefully brought together. It was fitted for a different forum, where the facts could be considered and placed one against the other; but it enters a field of inquiry over which we have no jurisdiction, for our examination of the evidence, even in the light of his discussion, discloses no finding without evidence in its support, and as to the one above referred to and chiefly drawn in question, there is, I think, abundant and satisfactory proof.

The next question presented by the appellant relates to the scope and effect of the release and quit-claim. It is, no doubt, void if the plaintiff had no property in the thing released or conveyed. But it was otherwise with the plaintiff. The property which forms the subject of the legacy was, by the terms of the will, separated from the general estate for the benefit of the legatees, the interest to be paid to Wessel during his life, and upon his death without issue, one-fourth of the property

itself given to the plaintiff. It does not seem necessary to determine whether an interest at once vested in her, or whether time and the happening of the specified event were of the substance of the gift, and prevented it from vesting until the event happened. In either case, she acquired an interest (2 R. S. 723, art. 1, tit. 2, part 2, chap. 1, § 10); although the right to possession was postponed to a future period and depended upon the contingency of the death of Wessel without children. This did not prevent the creation of the estate, but rendered it liable to be defeated. (Art. 1, chap. 1, tit. 2, part 2, vol. 1, R. S. 725, § 31.) It was an estate in expectancy (§ 9, p. 725, id.), however, and could not be destroyed by any alienation or other act of Wessel or his trustee (§ 32, id.), and upon his death without children would become absolute in the plaintiff. It was therefore alienable by her to the same extent as if in possession (§ 35, id.), and whether it be deemed vested or contingent. (*Moore v. Littel*, 41 N. Y. 66; *Sheridan v. House*, 4 Keyes, 569; *Woodgate v. Fleet*, 44 N. Y. 1.) These rules apply although the property involved is personal and not real. (1 R. S. 773, §§ 1, 2, tit. 4; chap. 4, part 2, tit. 3.) It seems to us also that the instrument executed by the plaintiff was sufficient to transfer to Wessel the plaintiff's interest in the trust fund, whatever it was. It must be noticed that by the will of her father the plaintiff was twice remembered. The same clause which gave her an interest in the trust fund also gave to her absolutely and at once, one-fourth of the whole body of that class of property from which the trust fund was to be taken. It was therefore to be expected that in describing the interest intended to be transferred, she should speak of "the trust fund"; and so the release or quit-claim was drawn in view of that fact, and to distinguish between the two provisions. Such is its language and effect. The release is "of all title, claim and demand of, in and to the trust fund given and bequeathed \* \* \* for the use and benefit of said Wessel T. B. Van Orden," not in the bonds and mortgages, etc., from which that fund is to be taken; thus leaving

no room for doubt as to what was intended. The conveyance is of all her interest in that fund.

It is also urged that the transaction indicated by the release is void as against public policy — “a fraud against the ancestor.” This is not apparent. The parties were *sui juris*, and the court cannot modify a gift or restrain by limitations the use of the testator’s bounty. It may be that he intended, as the appellant claims, “to stint” one child for the benefit of the others. If so, it would not be unnatural for them to make such division as would wipe out the inequality, or to do what they liked with their own. But if the testator’s object was to withhold the property from a use not agreeable to his judgment, as suggested by the appellant’s counsel, it has found no expression in his will; and what he omitted the court can neither formulate nor supply.

Much of the evidence on which the plaintiff relied was drawn from the defendant; and her counsel makes the further point that he was incompetent as a witness, at the same time coupling with it the assurance “that to reverse on that ground would be to shut out much that sheds light upon the transaction as a coercive, doubtful and inequitable” one. It is not usual for a party upon appeal to object to the competency of a witness called and examined by himself before the trial court; yet it is so here. The defendant, at the outset of the trial, was the first witness. He was called by the plaintiff and examined and cross-examined, and thereupon the plaintiff rested. He was subsequently recalled and examined in his own behalf. The objection now made is general, that he was not competent under section 829 of the Code. He is not thereby rendered incompetent for all purposes, even in actions by administrators, but only “as to personal transactions or communications between the witness and the deceased person.” The learned counsel points to no exception which brings up a violation of that rule, and a careful reading of the extended evidence leads to no discovery of such a case. On the contrary, in various instances the referee excluded evidence when bordering upon it, and in more than one ruling declared that when-

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ever offered it would be excluded. There was watchfulness to avoid infringing it in spirit or in letter; and this desire was also shared by the defendant, for the appellant's counsel now says: "By dint of evident intermediation from counsel the defendant sought to keep every thing out that he said to Mrs. Ham or she to him." Nor does the learned and ingenious counsel now indicate a ruling in this respect where error occurred.

There are other objections made, resting upon exceptions to evidence. They have been examined, but appear to be without force. There are none which affect the merits of the controversy, or which, even in actions at law, would require a new trial. The hearing was had before an experienced referee, conducted by expert and learned counsel, and the result of our examination is that the judgment rendered by the referee and approved by the General Term stands upon no error. It should therefore be affirmed.

Judgment affirmed, with costs.

All concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondents, v.  
HENRY B. DENNISON et al., Appellants

Where the *gravamen* of an action is fraud, plaintiffs having failed to establish the fraud cannot maintain the action on the theory that a liability founded on contract was disclosed by the evidence.

In an action founded on fraud, a counter-claim founded on contract cannot be allowed.

Plaintiff's complaint alleged in substance that under color of a contract defendant fraudulently obtained money from the State by means of false representations, false vouchers and collusion with State officers. Defendants set up as a counter-claim a balance due them from the State for work done under the contract. To the answer a reply was served. *Held*, that the cause of action set up as a counter-claim was not one arising out of the transaction upon which plaintiff's claim was founded, within the meaning of the Code of Procedure (§ 150); and that a counter-claim founded on contract was not proper in such an action.



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A State by coming into court as a suitor does not subject itself to an affirmative judgment upon a set-off or counter-claim.

Authority to render a judgment against the State in one of its own courts cannot be implied but must be express. It cannot be claimed under general laws in which the State is not mentioned.

Accordingly *held*, that the provision of the Revised Statutes (2 R. S. 552, § 13) providing that civil actions or proceedings instituted in the name of the State "shall be subject to all provisions of law respecting similar suits and proceedings" instituted by individuals, save where otherwise provided, and that the State shall be liable to be nonsuited, etc., did not authorize an affirmative judgment against it on a counter-claim.

Judgment was rendered upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general on appeal to this court gave the required stipulation for judgment absolute. *Held*, that this was not an assent to an affirmative judgment on the counter-claim; that it waived no legal objection to the counter-claim, or immunity of the State from such a judgment.

It was claimed on the part of defendants that the counter-claim, having been put in issue, would be barred if no judgment was rendered thereon. *Held*, untenable; that defendants' demand for a balance due, not being the proper subject of a counter-claim in this action, was not properly in issue and the judgment rendered would not conclude defendants in respect thereto.

*It seems* that the right of a debtor of the United States government, when sued by it, to interpose a counter-claim or counter-credits, rests in all cases upon the provisions of the act of Congress granting and regulating it (Act of March 3, 1797, §§ 3 and 4); and while, under said act, a defendant upon complying with its conditions may give in evidence any counter-claim he may have in his own right, which is a proper subject of set-off, such counter-claim is available only to the extent necessary to defeat the claim of the government, and no affirmative judgment for any excess can be rendered against it.

(Argued February 2, 1881; decided March 1, 1881.)

APPEAL from an order of the General Term of the Supreme Court, in the third judicial department, made September 17, 1880, affirming an order of the Special Term vacating a judgment entered herein, for the amount of a counter-claim set forth in the answer, upon a remittitur from this court which directed judgment absolute against plaintiffs.

The State, on the 9th day of September, 1879, entered into a contract with defendant Denison to do certain work upon the Erie canal, and to furnish the materials therefor, in which

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the other defendants were the partners of Denison. The complaint herein averred, in substance, that under that contract the defendant should have received only \$74,183.40; that no legal or valid change or alteration of that contract was ever made; that at various times between the 23d day of November, 1869, and 1st day of June, 1875, by false pretenses and false certificates from resident and assistant engineers, the defendants obtained several hundred thousand dollars from the State in excess of what they were legally entitled to receive under their contract; that the "false certificates and vouchers presented by the defendants, which were procured by them from the assistant engineers and resident engineers, officers of the State, \* \* \* were procured and obtained by the exercise of corrupt influences upon the said officers, and among other influences, by inducing the said officers to believe that, through the great political power and influence of the defendants and their friends, the said engineers would be dismissed if they refused to sign such certificates and vouchers," and it concluded with a demand for judgment against the defendants "for the sum of \$417,571, with interest thereon from the 1st day of January, 1870, besides costs of the action."

The answers deny all fraud, corruption and collusion of every kind. They admit the making of the original contract set out in the complaint, but aver the legal performance of work and furnishing of materials for and to the State to the amount of \$494,584.05, in actual value, which have been duly accepted by it. The payments on account thereof are detailed, and all are averred to be under legislative appropriations made for that purpose. Such payments, however, the answers claim, do not liquidate the demands of defendants in full; but on the contrary \$73,674.05 is charged to be justly due and owing by the State to the defendants on account of the work done and materials furnished by them, for which sum, "with interest thereon from the 1st day of June, 1875, with costs of this action," judgment is demanded.

To the answer of the defendants there was a reply by the plaintiffs, putting in issue the right of the defendants to re-

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cover the moneys set up by way of counter-claim, and also the facts upon which such right of set-off was averred to exist.

The report of the referees, to whom the action was referred to hear and decide, did not find any fraud, nor that the State had paid for work or materials in excess of their actual value, but that alterations in the original contract, requiring more work and materials, were contrary to law, that the payments made on account of such increased work and materials, amounting to \$332,926, could be recovered by the State, and that the plaintiffs were entitled to a judgment for that sum against the defendants, with interest.

The judgment entered upon this report was reversed by the General Term and a new trial was ordered.

The attorney-general appealed to this court, giving the stipulation for judgment absolute, etc., in case of affirmance, required by the Code of Civil Procedure (§ 191).

The order of the General Term was affirmed by this court (see Mem. 80 N. Y. 656), and upon the remittitur judgment, was entered against plaintiff for the amount of the counter-claim, besides costs.

*William C. Ruger* for appellants. The position of a sovereign and suitor are irreconcilably opposed, and by adopting one character the other must be abandoned. (*People v. Stephens*, 71 N. Y. 549, 550; *United States v. Mann*, 2 Brock. Marshall, 12.) It would be a violation of natural justice for the State to claim exemption from the obligations of a code to whose arbitrament it appeals and which it seeks to enforce against its adversary. (*People v. Brandreth*, 36 N. Y. 197; *State of Illinois v. Butterford*, 8 Paige, 554; *United States v. Arredondo*, 6 Pet. 711; *United States v. Bank of Metropolis*, 15 id. 377.) An individual sued by the government may set up as a defense in such action, by way of off-set or counter-claim, such "credits," either legal or equitable, as might exist in his favor against the government. (1 U. S. Statutes at Large, 515; Act of Congress, § 3, of March 3, 1797; *United States v. Robeson*, 9 Pet. 319; *United States v. Wilkins*, 6 Wheat. 135;

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*United States v. Gratiot*, 15 Pet. 336; *United States v. Ringgold*, 8 id. 150; *United States v. Preston*, 1 McLean, 65; *United States v. Ware*, 4 Wall. 617; *United States v. Bank of Metropolis*, 15 Pet. 377; *United States v. Eckford*, 6 Wall. 484; *United States v. DeGroot*, 5 id. 431.) The want of jurisdiction over the person is waived and the power of the court to render judgment upon a counter-claim against the State is fully confirmed. (§ 13, tit. 17, chap. 8, part, 3, vol. 3, of the sixth edition of the Revised Statutes.) If this had been a case instituted by a citizen against the defendant no question could arise, but that the counter-claim therein was properly pleaded and legally allowable. (Old Code, §§ 149, 150; *The Glen & Hall Manfg. Co. v. Hall*, 61 N. Y. 226.) In such a case the defendants would have been entitled to an affirmative judgment for the amount of their counter-claim. (Old Code, § 274; new Code, §§ 504, 1323; *Ogden v. Coddington*, 2 E. D. Smith, 317; *People v. Brandreth*, 36 N. Y. 197.) That that is the true meaning of the statute is implied by other legislation. (Laws of 1878, § 1, chap. 270; Laws of 1880, § 1, chap. 272.) The phraseology employed in the Code of Civil Procedure clearly authorizes a judgment against the State. (§§ 1984, 1985.) Chapter 444, Laws of 1876, creating a board of audit, does not purport to repeal any existing provision of law; a repeal by implication is not favored. (*Taylor v. City of New York*, MSS., Ct. of App.) If the defendant had a valid legal defense to this action when the act was passed, the passage of the act would not deprive him of it, except by express language showing an intent to do so. (*Dash v. Van Kleeck*, 7 Johns. 477; *Fitzpatrick v. Boylan*, 57 N. Y. 433; *Tint v. De Cabezos*, 18 Abb. Pr. 143; *Pulmer v. Conly*, 4 Denio 376; *Hitchcock v. Way*, 6 Ad. & Ell. 943; *Jordan v. National S. & L. Bank*, 74 N. Y. 475.) Jurisdiction was conferred upon the court by the stipulation of the attorney-general on appealing from the order of the General Term, whereby he stipulated that upon an affirmance of the order appealed from, judgment absolute should be rendered against the plaintiffs, in favor of the defendants. (Laws of 1875, chap. 49, § 4; 1

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Kent's Com. 464; *Stief v. Hart*, 1 N. Y. 20; *Livingston v. Harris*, 11 Wend. 329; *Peoples v. Stephens*, 52 N. Y. 310; *Lanman v. Lewiston R. R. Co.*, 18 id. 493; *Lake v. Nathans*, 67 id. 589; *Hitchings v. Van Brunt*, 38 id. 335; *Northern Ins. Co. v. Wright*, 76 id. 446; *Cobb v. Hetfield*, 46 id. 533; *Godfrey v. Moser*, 66 id. 250; *Rust v. Hauselt*, 22 Alb L. J., No. 14, Oct. 2, 1880; *Harris v. Hiscock*, MSS., Ct. of App., March, 1880; *Le Geun v. Gouverneur*, 1 Johns. Gas. 436; *Embury v. Connor*, 3 N. Y. 511.) The resident and division engineers are made the agents of the State to measure and certify to canal work. (Chapman's Manual, §§ 141, 142, 308, 309, 310, chaps. 262, 278, Laws of 1848.) The auditor is expressly authorized to audit all claims arising under the act chapter 877, Laws of 1869, § 1. A general act of the legislature authorizing payments to be made on a void contract legalizes the entire contract. (*Benedict v. Smith*, 10 Paige, 127; *Corning v. Southland*, 3 Hill, 552; *Moss v. R. I. R'y Co.*, 5 id. 157.) The allowance of interest on this claim is expressly authorized by statute. (Laws of 1874, chap. 266, § 1; Chapman's Manual, § 156.)

*Roscoe Conkling* for respondent. Judgment for counterclaim against the State cannot be maintained. (Old Code, § 150; 2 Duer, 442; 3 R. S. 553; 19 Wall. 239; Broom's Legal Maxims, 85 [3d ed.]; *U. S. v. Giles*, 9 Cranch, 212, 227, 228; *U. S. v. Wilkins*, 6 Wheat. 135, 144; *U. S. v. Mann*, 2 Brock. 9; *U. S. v. Arredondo*, 6 Pet. 711, 712; *People v. Brandreth*, 36 N. Y. 197; *U. S. v. Bank of Metropolis*, 15 Pet. 377; *Reeside, Ex'trix, v. The Secretary of the Treasury*, 11 How. [U. S.] 272, 292; *Briscoe v. Kentucky Bank*, 11 Pet. 321; 4 How. 288; 9 id. 389; *De Groot v. The U. S.*, 5 Wall. 419, 431; *U. S. v. Eckford*, 6 id. 484; *Schaumburg v. The U. S.*, 24 Int. Rev. Rec. 76; 5 Redf. 551; Act of March 3, 1797 [1 Stats. at Large, 515]; *U. S. v. Mann*, 2 Brock. 12, 13; *Battle v. Thompson*, 65 N. C. 406; *Linslie v. King*, 1 Ired. 401; *Anneworth v. Fentress*, 1 Den. 419; *State v. Franklin Bank, of Columbus*, 10 Ohio, 91; *Gail Borden v. Hous-*

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ton, 2 Webb & Duvall [Tex.], 594; *Bates, Clerk, etc., v. The Republic of Texas*, 6 Wheat. 616; *Chevalier's Admrs. v. The State*, 10 Tex. 315; 2 id. 192; *Comm'rs v. Rhodes*, 5 T. B. Monroe, 318; *Dervere v. Harvie*, 7 id. 441; 14 Pet. 315; 7 Ired. [N. C.] 59; *Comm'rs v. Cook* [1871], 8 Bush, 224; *Nall v. Springfield*, 9 id. 674; *Comm'rs v. Todd*, id. 717; 2 Statute Law of Kentucky, 1448; Kentucky Code of Practice, 33; *State v. Balt. & Ohio R. R. Co.*, 34 Ind. 344, 374; 45 id. 609; *State v. Northern Cent. R'y Co.*, 18 id. 193; 9 Gill, 89; *Comm'rs v. Matlack*, 4 Dallas, 303; 1 Brightly's [Purdon's] Dig. 457, tit. "Defalcation;" *White v. The Governor*, 18 Ala. 767, 769; Clay's Dig. of Laws, 338; *City of New Orleans v. Finnerty*, 27 La. Ann. 681; *State v. Floyd*, 28 id. 553; *State v. Lackie*, 14 id.; *City of New Orleans v. Davidson*, 30 id. 541 Louisiana Code of Practice, art. 371; *Treasurer v. Cleary*, 3 Rich. [S. C.] 372; *Raymond v. The State*, 54 Miss. 562; 21 Alb. L. J. 381, 382; Rev. Code, Miss. [Poindexter, 1824] 119; *Auditor v. Davies*, 2 Ark. 494; *Biscoe v. State*, 19 id. 539; R. S., Ark. 1837, p. 726; Rev. Code of Miss. 321 [ed. 1871]; *Printup v. Cherokee R. R. Co.*, 45 Ga. 315.) The State not being named in any of our statutes of counter-claim, there was no authority to enter a judgment against it for the counter-claim. (3 R. S. 553; old Code, §§ 168, 319; 36 N. Y. 191.) The stipulation, as given by the plaintiff on its appeals to the Court of Appeals, did not entitle the respondents, if they succeeded on the appeal, to all the relief they demanded in their answer. (*People v. Brandreth*, 36 N. Y. 191; *Lanman v. The Lewiston R. R. Co.*, 18 id. 493; *Hitchings v. Van Brunt*, 38 id. 335; *Cobb v. Hatfield*, 46 id. 533; *Godfrey v. Moser*, 66 id. 250; *Lake v. Nathans*, 67 id. 589; Voorhees' Code, 224, note; *Ives v. Goddard*, 1 Hilton, 435.) A reply to an answer does not admit that a counter-claim is set up in the answer. (67 N. Y. 48.) In order to constitute a counter-claim against the State the allegations in the answer must show that all the conditions precedent, necessary to exist before a claim was perfected against the State, had accrued. (R. S. [6th ed.], chap. 9, §

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49, tit. 9, part 1, p. 651; 1 id. [6th ed.] 655, § 70; *People v. Benton*, 7 Barb. 208; *Town of Guilford v. Cooley*, 58 N. Y. 116.) The Court of Appeals having held this to be an action in tort, the counter-claim fails, as no counter-claim can be sustained in an action of tort. (*Smith v. Hall*, 67 N. Y. 48; *Pattison v. Richards*, 22 Barb. 143; *Ashens v. Hearn*, 3 Abb. 187; *Schnaderlock v. Worth*, 8 id. 37; *Jellerman v. Dolan*, 7 id. 395, note; *Gottler v. Babcock*, id. 392, note; *Donohue v. Henry*, 4 E. D. Smith, 162; *Drake v. Cockcroft*, id. 34; *Page v. Edgerton*, 18 How. 359; *De Leyer v. Michaels*, 5 Abb. 203; *McKenzie v. Farrell*, 4 Bosw. 193; *Bissell v. Pearce*, 21 How. 130; *Kurtz v. McGence*, 5 Duer, 660; *Mayor of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. 300; *Murden v. Priment*, 1 Hilt. 75; *Chambers v. Lewis*, 2 id. 591.)

RAPALLO, J. The General Term held, upon the appeal from the judgment, that this action was founded upon the allegation of fraud, and reversed the judgment and granted a new trial on the ground, among others, that the plaintiff, having failed to establish the fraud alleged, could not maintain the action on the theory that a liability founded on contract was disclosed by the evidence.

That decision was affirmed by this court,\* and it was distinctly held by us that this was an action for a tort, and not upon contract.

It was consequently an action in which a counter-claim founded on contract could not properly have been allowed. (*Smith v. Hall*, 67 N. Y. 48; Code, § 150; *Pattison v. Richards*, 22 Barb. 143.) The claim of the defendants was a cause of action, not arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. The subject of the action was a fraud alleged to have been committed by the defendants upon the plaintiff, the allegation being that the defendants fraudulently obtained money from the State by means of false repre-

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\* 80 N. Y. 656.

sentations, false vouchers and collusion with State officers. The counter-claim was that the State was indebted to the defendants on contract for work and materials which had not been paid for. The circumstance that the work in respect to which the fraudulent representations charged were alleged to have been made, was the same for which the defendants claimed that an indebtedness existed in their favor, does not bring the case within section 150 of the Code. The subject of this action, which was the fraud, was wholly distinct from the claim set up by the defendants for money due on the contract for the work. Nor has section 150 been regarded as conferring the right to set up a counter-claim founded on contract, in an action of tort.

The judgment having been reversed on the ground of the failure of the plaintiff's case, the counter-claim has not been adjudicated upon in any form, nor was its validity passed upon or involved in the decisions rendered on the appeals; nor, for the reasons stated, could it have been considered if the plaintiff had gone to a new trial. The fundamental objection to the counter-claim was not waived or cured by the reply. (*Smith v. Hall*, 67 N. Y. 48.)

The ground already stated is sufficient to sustain the order appealed from. But behind and beyond that, lies the further insuperable objection to the recovery claimed, that the court had no power to render an affirmative judgment against the State. This point has been so fully covered by the opinion of WESTBROOK, J., at Special Term, that it is not necessary to review in detail the authorities upon the subject and the points so ably and forcibly pressed upon the court by the learned counsel for the appellants. We shall, therefore, do little more than state our conclusions.

The position that a State or sovereign, by coming into court as a suitor, abandons its sovereignty and subjects itself to any affirmative judgment which the court may render against it upon a set-off or counter-claim cannot be maintained. It is opposed to all the authorities, and the principle upon which they are founded, and the dicta of learned judges which have been cited in its support, though maintaining the right of



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set-off, do not necessarily go to the extent claimed, of asserting that an affirmative judgment may be rendered against the government for any balance found due from it. While the government may, through its courts, enforce its claims against its citizens, this right is not reciprocal. A set-off is in the nature of a cross-action, and the government cannot be sued except by its own express permission. This is a universal principle applicable to every sovereignty, and often recognized in the courts of the United States. The right of a debtor of the United States government, when sued by it, to interpose a counter-claim or counter-credit, even to the extent necessary to protect himself against the claim of the government, is conceded in all the cases to rest upon the provisions of the act of March 3, 1797 (§§ 3 and 4), which require that such counter-credits be first submitted to the proper accounting officers. They can only be set up in court after having been disallowed by such officers, except in special cases. It was supposed at one time that this statute authorized the court to render judgment against the government for any balance found due the defendant, and there are some instances of judgments of Circuit Courts to that effect. (*U. S. v. Bank of Metropolis*, 15 Pet. 377.) But this doctrine was not sustained by the Supreme Court. A defendant sued by the government may, under the statute referred to, and on complying with its conditions, give in evidence any counter-claim or credit he may have in his own right, and which is a proper subject of set-off, whether arising out of the transaction on which he is sued or an independent transaction (*U. S. v. Wilkins*, 6 Wheat. 185), but it is now well settled that such counter-claim is available only to the extent necessary to defeat the claim of the government, and that no judgment can be recovered against the government for the excess, should there be any. (*Reeside v. Sec. of Treas.*, 11 How. 272; *De Groot v. U. S.*, 5 Wall. 431; *U. S. v. Eckford*, 6 id. 484.) No action can be sustained against the government except by its own express consent, under some special statute allowing it (11 How. 290), and to permit a demand set up by way of counter-claim

against the government to be proceeded upon to judgment against it, would be equivalent to permitting a suit to be prosecuted against it. (Id.)

Authority to render a judgment against the State or government, in one of its own courts, cannot be implied but must be express, nor can it be claimed under general laws in which the State is not named. (19 Wall. 239.)

The learned counsel relies upon 2 Revised Statutes, 552, 553, section 13, as conferring authority to render the judgment in question. That provision is as follows:

“Every suit or proceeding in a civil case instituted in the name of the State, by any public officer duly authorized for that purpose, shall be subject to all the provisions of law respecting similar suits and proceedings, when instituted by or in the name of any citizen, except where provision is or shall be otherwise expressly made by statute; and in all such suits and proceedings the people of this State shall be liable to be nonsuited and to have judgments of *non pros.* or discontinuance entered against them in the same cases, with like manner, and with the same effect, as in suits brought by citizens, except that no execution shall issue therein.”

The first branch of this section, which in general terms subjects suits brought by the State to all provisions of law respecting similar suits brought by a citizen, would, we think, even if standing alone, be insufficient to confer authority to render an affirmative judgment against the State upon a counter-claim or set-off. If such effect had been intended, it would have been specifically declared, and the machinery for paying such judgments would have been provided. But that it was not so intended is made clear by the subsequent express grant of power to render certain judgments, such as “*non pros.*,” “discontinuance,” etc. It seems to have been deemed necessary to enumerate these judgments, as they empower the defendant to take affirmative steps against the State to turn it out of court on account of its own laches. It cannot be supposed that if it had been intended to confer upon the courts the power of rendering affirmative judgments against the State,

founded upon set-offs or counter-claims, the legislature would have failed to enumerate that novel and extraordinary power, while taking pains to mention those of so much minor importance.

The stipulation given by the attorney-general, on taking the appeal to this court, is relied upon as some sort of an assent to the judgment in question. We cannot so construe it. It was a stipulation which the law compelled him to give, to enable him to take the appeal to this court from the order granting a new trial, and its form was, that in case the new trial should be denied, judgment absolute might be rendered against the appellants.

This stipulation waived no legal objection which might exist to the counter-claim, and no immunity of the State from an affirmative judgment against it. It authorized the court to render only such judgment as it was justified by law in rendering, and had had power to pronounce. It simply waived a new trial and rested the plaintiff's case upon the question whether the judgment of the referee should be sustained, or whether it was properly reversed by the General Term. If the reversal was sustained, it was made absolute, and ended the case so far as the right of the plaintiff was concerned. The question of the right of the defendants to go further, and obtain judgment on their counter-claim against the State, was left for the court to determine, and was not affected by the stipulation.

The counsel for the appellants further contends that the counter-claim, having been put in issue in this action, will be barred if the judgment below is not sustained. We do not think any such result can follow. What we decide is that the defendants' demand for the balance claimed to be due them for work done under their contract, was not a proper subject of counter-claim in this action. It was, therefore, not properly in issue therein. It has never been tried or adjudicated upon, and if it had, the court had no power to render judgment thereon against the State. Another mode of redress is provided by statute in such cases, and if the defendants have any just claim against the State they must apply for relief to the board of

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audit, the tribunal instituted by the State for passing upon such claims. As their claim was not triable or recoverable in this action, the judgment rendered herein does not conclude the defendants in respect thereto.

The order should be affirmed, with costs.

All concur.

Order affirmed.

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CATHARINE GORMERLY, Appellant, v. SARAH McGLYNN et al.,  
Respondents.

The provision of the Code of Civil Procedure (§ 17) authorizing a convention of the General Term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code.

The provision of said Code (§ 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative.

(Submitted February 1, 1881; decided March 1, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made November 22, 1880, which affirmed an order of Special Term denying a motion on the part of plaintiff, that the case herein be sent back to the referee for the purpose of resettling the same.

Upon settlement of the case defendants' counsel requested and the referee made a number of additional findings of fact.

*S. V. Lowell* for appellant.

*James Crumbie* for respondents. The new Code does not change the former practice of obtaining findings of fact in the

settlement of a case when the action is tried before a judge or referee. (Code of Civil Procedure, § 1023, and note.)

FINCH, J. This appeal presents for our decision the question whether section 1023 of the Code of Civil Procedure is inconsistent with rule 32 of the Rules of the Supreme Court, as it stood prior to the amendment made at the last meeting of the justices of that court. The rule permitted a party, after the report of a referee or the decision of a court, upon the settlement of a case, to present proposed findings of fact, and the justice or referee was thereupon required to pass upon such questions of fact so presented by either party as should be material to the issue. The practice under this rule, in cases where the referee refused to make additional findings, became awkward and inconvenient. No exception to such refusal would lie, and the remedy of the party aggrieved was by motion in the court below for an order sending back the report with instructions requiring findings upon questions decided to be material. (*Rogers v. Wheeler*, 52 N. Y. 262, etc.) In the revision which produced the Code of Civil Procedure, this inconvenience was sought to be remedied. By section 993 it was provided that a refusal to make any finding whatever, upon a question of fact where a request was seasonably made by either party, is a ruling upon a question of law. If the change had stopped here, its only effect would have been that a new and additional remedy would exist in the case of a refusal to make the findings upon a material question of fact. But the change went further. By section 1023 it was provided that before the cause is finally submitted to the court or referee, or within such time afterward, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts which he deems established by the evidence and of the rulings upon questions of law which he desires the court or referee to make. It is then made the duty of such court or referee, at or before the time when the decision or report is rendered, to pass upon such proposed findings, and note his disposition of them in the

margin. The justices of the Supreme Court derive their authority to make rules of practice from section 17 of the Code of Civil Procedure, but their power to do so is limited to such rules as are not inconsistent with that act. The evident purpose was, not to enable the convention of justices to alter, modify or annul any rule of practice established by the Code, but merely to make such others, not therein provided for, as should be deemed necessary, and should be consistent and in harmony with the provisions of the Code. When, therefore, the legislature, by section 1023, fixed and determined the practice as to findings of the court or referee, and provided that the request should be made and the findings passed upon before the final decision or report, the provision was an evident disapproval of the practice permitted by rule 32, which allowed such requests and findings after the decision or report, and upon the settlement of the case, and made that rule inoperative. The provisions of section 1023 as to the time of presenting requests and the required action of the justice or referee were unnecessary and improper, if rule 32 was to remain in force. Its evident purpose was to change the practice in that respect and not permit an application for findings, or compel a decision upon them, after the final disposition of the case. This intention is made more clear by the provision that any extension of the time within which to ask for findings beyond the submission of the case is to be controlled by the court or referee, but is not to reach beyond the rendering of the decision or report. The purpose to keep within that limit is very apparent. We held in *French v. Powers* (80 N. Y. 146) that rule 34 of the Supreme Court, which required a case to be served within ten days after written notice of the decision or report, in an action tried before the court or a referee, was in conflict with section 268 of the Code, and consequently inoperative. The effect of the rule there was to shorten the time given by the Code for filing exceptions. The effect here is to lengthen it, and without the consent of the court or referee, which the Code makes essential within its restrictions. This view of the conflict between the rule and the Code has been sustained by the General

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Term of the third department (*Palmer v. The Phoenix Ins. Co.*, 22 Hun, 224), and we think correctly. The rule itself has been changed by the recent convention of justices, so as to correspond with the provisions of the Code. The revisers' note to section 1023, to which our attention is called, and which is said to declare a purpose not to abolish the practice under rule 32, has been too broadly interpreted. It says only that the method of proceeding, by motion, to compel findings, where the referee refuses to make them at all, has not been abolished, but a more prompt and simple remedy in that respect has been provided. We are of opinion, therefore, that the order of the General and Special Terms, denying the motion for a resettlement of the case, should be reversed, and the motion be granted, but without costs, as the question is new, and reliance upon the rule of the Supreme Court was not unreasonable.

All concur.

Ordered accordingly.

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THE PEOPLE ex rel. FRANCIS HIGGINS, as Receiver, etc., Respondents, v. DAVID McADAM, Justice, etc., Appellant.

Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 R. S. 512, § 28, subd. 4, amended by chap. 101, Laws of 1879), which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment-debtor, and all who hold under him under pretense of title acquired from him, posterior to the judgment. Accordingly held, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors, recovered prior to the

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appointment of the receiver, the Supreme Court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the Supreme Court the receiver was in effect the person against whom the execution was issued.

*The People ex rel. Higgins v. McAdam* (22 Hun, 559), reversed.

(Submitted February 1, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme court, in the first judicial department, entered upon an order made January 10, 1881, which affirmed a judgment awarding to the relator an absolute writ of prohibition, restraining the defendant from hearing and determining certain summary proceedings which had been instituted before him as one of the justices of the Marine Court of the city of New York, and which affirmed an order sustaining a demurrer of the relator to the return of defendant to an alternative writ of prohibition. (Reported below, 22 Hun, 559.)

The following facts appeared:

John H. McCunn died in 1872, possessed, among other property, of a leasehold interest in certain premises in the city of New York. His will was duly proved December 4, 1872, and James M. Gano, Thomas McCunn and Jane W. McCunn were appointed and qualified as executors and executrix thereof. On December 14, 1875, Francis J. Parker recovered a judgment in the Supreme Court against said executors and executrix for the sum of \$12,209.03, which judgment was docketed on the same day in the city and county of New York. On March 28, 1876, a receiver of the property of said John H. McCunn was appointed by said court, by an order made in two pending suits, one of them an action brought by Gano, executor, to have the will construed, and the other a suit in partition of said leasehold estate. The receiver so appointed took possession of the property of the deceased. He subsequently resigned, and the relator, Higgins, was appointed and qualified as his successor. On May 4, 1876, after the receiver had taken possession, the surrogate of the county of New York made an order granting leave to Parker to issue



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execution on his judgment. On September 2, 1876, execution was issued. On September 11th, the Supreme Court made an order giving leave to the sheriff to levy and enforce the execution on assets in the receiver's possession, or in that of the said executors belonging to the estate. On March 19, 1877, the sheriff sold the leasehold interest in question, under the execution, to James A. Flack. A certificate of sale in the usual form was executed and filed, and on June 20, 1878, a deed of conveyance of said interest was executed and delivered by the sheriff to Flack. On September 19, 1879, the relator, Higgins, as receiver, leased the premises in question to Virginia Herring, who entered into possession. On January 12, 1880, Flack demanded possession of the premises from Mrs. Herring. On January 24, 1880, he obtained an order of this court allowing him to commence and prosecute such actions or proceedings in any court having jurisdiction thereof, as he might be advised, to obtain possession of said premises. On January 29, 1880, he filed with the defendant an affidavit setting forth in substance the facts above stated and obtained from said justice a summons under the statute relating to summary proceedings, returnable on February 2, 1880. On that day Mrs. Herring and the relator appeared by counsel, and a motion was made to dismiss the proceedings, on the ground that the justice had no jurisdiction, which was denied. The proceedings were then adjourned, by consent, to the 14th of February, 1880. On the 12th day of February, 1880, the relator procured and served an alternative writ of prohibition restraining the prosecution of the proceedings; Mr. Justice McAdam made a return, which consisted in substance of a statement of the foregoing facts. To this return the relator demurred. The court, after argument, sustained the demurrer. Judgment was thereupon entered accordingly, and the writ was made absolute.

*Edward Jacobs* for appellant. The justices of the Marine Court have jurisdiction under the act in relation to summary proceedings. (3 R. S. [6th ed.] 824, § 28.) The tenancy in  
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this case was "a personal holding over and continuing in possession of real estate which had been sold by virtue of an execution against such person," within the meaning of the statute. (*Birdsall v. Phillips*, 17 Wend. 474; 2 R. S. 513, § 28, subd. 4; *Lynde v. Noble*, 20 Johns. 82; reviser's note, 3 R. S. 765 [6th ed.]; *Hallenbeck v. Gerner*, 20 Wend. 22; *Spraker v. Cook*, 16 N. Y. 567, 571; revisers' note to § 2232 of Throop's New Code; *People v. Palmer*, 16 Hun, 567.) The right to maintain summary proceedings under the statute is not confined to the purchaser at the sale. (*Brown v. Betts*, 13 Wend. 30.) The term "legal representatives," as used in the statute, includes the person to whom the landlord's title, or the tenant's possession, has been transferred, either by voluntary transfer or by act or operation of law. (*Matter of Renwick et al.* [January, 1879,] 1 N. Y. Monthly Law Bulletin, 19.) The reasoning of the General Term, that because the tenant was put in possession by the receiver, and there was no execution sale against such person, that these proceedings will not lie, is fallacious. (*Charitarque County Bk. v. Risley*, 19 N. Y. 369.) Even leave to commence proceedings against the tenant was unnecessary. (*Finnin v. Malloy*, 33 N. Y. Super. Ct. 382.) All the provisions of the statute in relation to the sale of real estate by execution and the redemption thereof were made applicable to leasehold property by the statute of 1837. (3 R. S. [6th ed.], p. 638, § 105.) A judgment against the executors or administrators of a deceased person is not a lien upon his real estate, and is not even evidence of the debt as against the heir or devisee. (45 N. Y. 806; 2 Lans. 172.) Where the interest is "leasehold" and vests in the executors or administrators as personalty, a different rule prevails. (*Despard v. Churchill*, 53 N. Y. 199; 3 R. S. [6th ed.] 617, § 4; id. 96, § 42; 125, §§ 19, 20, 21, 22, 23; *Bigelow v. Finch*, 17 Barb. 394; *Cook v. Kraft*, 3 Lans. 512.) The general scope and purpose of the proceeding was within the jurisdiction of the justice. (*People ex rel. Ran v. Seward*, 7 Wend. 518; *People ex rel. Greeley v. Oyer & Terminer*, 27 How. 19; *People, etc. v. Ct. of Com. Pleas*, 28 id. 477; *People ex*

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*rel. Bean v. Russell*, 8 Abb. [N. S.] 232; *People ex rel. Brownson v. Marine Ct.*, 14 Abb. 266.) The relator, if aggrieved, had an adequate remedy by *certiorari* to review the proceedings of the justice. (*People ex rel. Thatcher v. Clute*, 42 How. 157; *People, etc. v. Superv'rs of Ulster County*, 31 id. 239; *Ex parte Brandlacht*, 2 Hill, 367.) A writ of prohibition cannot take the place of a writ of error or other proceeding for the review of judicial action. (*The People v. Russell*, 19 Abb. 136; *Thompson v. Tracy*, 60 N. Y. 38.) This prohibition was not, when obtained, a writ of right. (High's Extraordinary Remedies, §§ 765, 767.) This writ was never allowed to usurp the functions of a writ of error or *certiorari*, and could never be employed for the correction of errors of inferior tribunals. (§ 772.) (*People v. Wayne*, 11 Mich. 393; High's Extraordinary Remedies, § 770; *Bulener v. Hase*, 3 East, 217.) Applications for injunctions to enjoin "summary proceedings" have invariably been denied where the statute gave the tenant an adequate remedy, *i. e.*, where his defense was of a legal character, which might (if true) be effectually established before the magistrate. (High on Injunctions, § 46; Kerr's Injunctions in Equity, 15; *Smith v. Moffat*, 1 Barb. 65; *Wordsworth v. Lyon*, 5 How. Pr. 463; *Hyatt v. Burr*, 8 id. 168; *Duigan v. Hogan*, 1 Bosw. 645; *S. C.*, 16 How. Pr. 164; *McIntire v. Hermander*, 7 Abb. Pr. [N. S.] 214; *Seeback v. McDonald*, 11 Abb. Pr. 97; *Ward v. Kelsey*, 14 id. 106; *McGune v. Palmer*, 5 Robt. 607; *Rapp v. Williams*, 4 T. & C. 174.)

*Adrian H. Joline* for respondent. The justice had no jurisdiction to hear or determine the summary proceedings in question. (2 R. S. 513 [2d ed.], 529; Laws of 1879, chap. 101.) This statute, being in derogation of the common law, must be construed strictly. It gives a new remedy and creates a new jurisdiction unknown to the common law. (*Miner v. Burling*, 32 Barb. 540; *Farrington v. Morgan*, 20 Wend. 207; *Campbell v. Mallory*, 22 How. Pr. 188; *Deuel v. Rust*, 24 Barb. 433; *Hill v. Stocking*, 6 Hill, 314; *People v. Boardman*, 4 Keyes, 59; 2 Crary's

Spec. Proc. 281; Potter's Dwarrior on Stats. 240, 259; *Van Horne v. Dorrance*, 2 Dall. 316; *Brown v. Barry*, 3 id. 367.) Neither the relator nor his tenant was the servant or agent of the judgment debtors, or ever took any conveyance or assignment from the judgment debtors. Nor was the relator's title acquired "subsequent to the lien of the judgment." (*Hallenbeck v. Garner*, 20 Wend. 22.) If the leasehold interest was realty, it could not be sold under a judgment against executors. (3 R. S., part 3, chap. 8, tit. 3, art. 1, § 12 [6th ed.], 733.) If it was not real estate, no judgment became a lien upon it until a levy was made. (2 R. S. 359, § 3; old Code, §§ 282, 462.) As the magistrate had no jurisdiction to entertain the proceedings, the remedy by writ of prohibition was relator's proper remedy. (*People ex rel. Wheeler v. Cooper*, 57 How. Pr. 416.)

FOLGER, Ch. J. Section 28, article 2, title 10, chapter 8, part 3 of the Revised Statutes (vol. 2, p. 512), provides that any tenant of premises may be removed therefrom, if they lie in the City of New York, by any justice of the Marine Court. The statutes, in subsequent sections, prescribe the manner in which the removal may be made. There is no question in this case but that the proceedings had before Justice McADAM were formally in accordance with the statute. The defendant in them, Virginia Herring, was the tenant of the premises, and they lay in New York city. So far, it seems that the justice of the Marine Court had jurisdiction. But the 28th section (*supra*), in four subdivisions, limits the general character of its first declaration, and therein designates the particular cases in which the power to remove may be exercised. The case in hand, if it meets either of those, meets the fourth. That is for the case of a person holding over and continuing in possession of real estate which shall have been sold by virtue of an execution against such person, after a title under such sale shall have been perfected. In the case before us there has been a sale of the premises of which Herring is in possession; the sale was by virtue of an execution; and the title under the sale has been perfected. The execution, how-

ever, was not against her. She is not, literally, the person against whom the execution was issued. If the provisions of the fourth subdivision are to be strictly applied, she is not amenable to them. There have been, however, judicial interpretations of it which have declared that it may be applied liberally. Thus it has been held that the proceedings may be had against the tenant of the person against whom the execution issued (*Birdsall v. Phillips*, 17 Wend. 464.); that the conventional relation of landlord and tenant need not exist between the purchaser at the sheriff's sale and the occupant of the premises, arising from a lease or compact between them; that the purchaser takes all the rights of the landlord; that there does thereupon arise between the purchaser and the tenant the relation of landlord and tenant; that the statute does not mean a holding over by his own personal act, but that if he do it by agent, servant or tenant at will, he may equally be said to hold over; that the statute is equally applicable to the judgment debtor and all who hold under him under pretense of title acquired posterior to the judgment. In *Hallenbeck v. Garner* (20 Wend. 22) the authority of 17 Wend. (*supra*) is recognized, and that a servant or agent, or one entering upon the premises under title derived subsequent to the lien of the judgment under which the sale has been made, is amenable to the statute. And in *Spraker v. Cook* (16 N. Y. 567) it is declared that by this statute the legislature has applied the designation of tenant to the judgment debtor in possession, and that of landlord to the purchaser of the land on execution, without discriminating between such parties and those who are properly landlords and tenants. It seems, then, that Herring, though not the person against whom the execution issued, is liable to proceedings under the statute, if she has entered upon the premises under pretense of title thereto, acquired subsequent to the lien of the judgment. And the dates furnished by the case show that she did. The debtor died in 1872, having a leasehold interest for years in the premises, not yet at an end. In December of that year executors of his will qualified and received letters testamentary, and went into possession of the

premises as owners of the leasehold estate. In 1875 one Parker, a creditor, recovered a judgment against those executors and docketed it. In March, 1876, a receiver of the estate was appointed, in proceedings by the executors for a construction of the will, and in proceedings for a partition of the leasehold estate. In May of that year, by order of the surrogate therefor, Parker issued an execution against the executors, judgment debtors in his judgment, and thereupon, in September of that year, issued an execution, which the Supreme Court ordered to be levied upon any of the assets or property of the testator in the hands of the executors, the judgment debtors. In 1877, the sheriff, by virtue of the execution, and a levy under it on the leasehold estate, sold that estate and gave a certificate to the purchaser. In 1878, at the expiration of fifteen months from the sale, the sheriff gave a deed to the purchaser, who is the same one who has taken these proceedings to remove Herring. In 1879, the receiver leased the premises to Herring, and she went into possession by authority of the lease, and under the title of the receiver. Thus it appears, that the possession of Herring is by the title of the receiver, and that his title was acquired posterior to the judgment. She is within the provisions of the statute, as interpreted by the adjudications that we have cited. The execution was not against her nor against the receiver who let to her. But it was against the executors. The receiver had no greater or other title than that of the executors; and no right to let, save what he got by acquiring their title. It was either under their title that Herring held, which was a title subject to the lien of the judgment, and swept away by a sale under execution thereon and a perfecting of the sale thereon by taking the sheriff's deed; or it was under the title of the receiver, which was a title posterior to the lien of the judgment and equally swept away. The receiver did not take strictly under the executors, but he took only their right and title; he took not as their agent or servant, but he took as representing their testator in part, and those interested in the testator's estate in part. *Spraker v. Cook* (*supra*) shows that an exact meaning is not to be given to the terms "landlord" and

"tenant," in applying the fourth subdivision of the twenty-eighth section; that the purchaser is a landlord, and that any one in possession under the title that the purchaser has acquired is a tenant, within its scope.

We perceive that the interest in real estate affected by the proceedings is a leasehold for a term of years. Such an interest was at common law personal property, but the statutes of this State have for some purposes modified its character. Estates for years are by those statutes denominated estates in lands. They are still chattels real, and are not classed as real estate in the chapter of the Revised Statutes, of "Title to Property by Descent." A judgment binds and is a charge upon the chattels real of every person against whom the judgment is rendered. We will not say, that estates for years in the hands of executors are thus bound and charged, when they have acquired them as the property of their testator, though the judgment be against the executors. For leases for years of a decedent go to his executor or administrator, as assets for distribution, and vest in him as part of the decedent's personal property. (*Despard v. Churchill*, 53 N. Y. 199, and citations there made.) It may be that there is a conflict in the statutes on this subject, when it is sought to apply them all at once to such a state of facts as has arisen in this case. If there be, it is not needed that we seek to allay it now. The creditor recovered and docketed his judgment against the executors, before the appointment of a receiver. The receiver was appointed by the Supreme Court. He was not appointed on the application of creditors. His duty was to receive rents and profits and collect personal estate, and to make deposits with a trust company. He stood in the place and stead of the executors for the benefit of those in any wise interested in the estate of the testator. He was not in hostility to the judgment creditor. When the creditor had, by an order duly made by the surrogate, issued his execution to the sheriff, commanding him to collect it out of the assets and personal property of the testator in the hands of the executors at the time when the judgment was docketed, the Supreme Court then gave leave

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that the execution be levied and enforced upon any assets or property in the hands or under the control or possession of the receiver, or of the executors, which were of or belonging to the testator.

This order, made by the same court which had appointed the receiver, justified the levy upon this leasehold estate; and when the levy was after that made, established it as a binding charge upon that estate, as fully as the judgment could have been had it been rendered against the testator. It did more than that; in effect, it made it an execution, not only against the defendants named in the judgment, but against the receiver also. He was by the operation of the order, though not in terms, yet in substance, the person against whom the execution was issued. The levy and sale under it, and the perfecting of the sale, took place before the lease by the receiver to Herring. Thus her possession was taken under a title that was subordinate to, or extinguished by, the judgment, execution and order, sale and deed. We see no reason why the facts do not bring the case within the principle of the adjudications that we have cited. If so, the justice of the Marine Court had jurisdiction of the subject-matter, of the persons and of the case, and should not have been prohibited from exercising it.

The judgment appealed from should be reversed.

All concur.

Judgment reversed.

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**MATILDA W. STEVENS, Administratrix, etc., Appellant, v. THE  
MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW  
YORK, Respondent.**

Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and



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embraced within the issue." (Code of Procedure, § 275; Code of Civil Procedure, § 1207.)

The plaintiff, therefore, must establish the allegations, and if they warrant legal relief only, he cannot have equitable relief upon the evidence. Plaintiff's complaint alleged in substance that prior to July, 1866, he was the owner of certain premises in the city of New York, part of an old street which had been closed and a new street opened, of which fact and of his title plaintiff was ignorant; that defendant sold said premises at public auction, and thereafter applied to the plaintiff for a release and conveyance of his title, at the time, "fraudulently and with intent to deceive," keeping concealed from him the facts, and falsely informing him that he had some slight claim, a mere equitable one of no value, and "that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, executed and delivered such release without any consideration." That the premises so conveyed were worth \$200,000, and judgment was demanded for that amount. The answer denied the allegations of fraud, and the referee found in favor of defendant. *Held*, that the action was one at law only, and plaintiff not having sustained the allegations of the complaint, a judgment for defendant was proper, although the case may have presented matters of equitable cognizance.

(Argued February 2, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 18, 1880, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was originally brought by Russell D. Miner; he having died during its pendency, the present plaintiff, as administratrix, with the will annexed, was substituted.

The complaint alleges in substance that prior to July, 1866, plaintiff was the owner of certain premises which were described, situate in the city of New York, which were a portion of a street that had been closed, and a new street (Seventy-eighth) opened, and thus the premises were relieved from the public easement; that plaintiff was ignorant of these facts. The complaint then proceeds as follows:

"That, in May, 1866, the defendants offered for sale at public auction certain lands adjoining the said old street, and included in such sale the premises before described, and that

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one or more of the purchasers declined to take title, on the ground that the plaintiff, and not the defendants, was the owner of such premises; and that thereupon defendants employed an agent to obtain for them the plaintiff's title, of all which plaintiff was ignorant until May, 1869.

"That in July, 1866, the defendants applied to the plaintiff for a release and conveyance of his title, and at the time of such application, fraudulently, and with intent to deceive the plaintiff, kept concealed from him the fact of the opening of Seventy-eighth street, and also the closing of the old street. And, further, falsely informed the plaintiff that he had some slight claim to the said portion of said street, but that it was a mere equitable claim, and of no value, and asked him to execute a release or deed thereof. And that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, and relied upon, executed and delivered such release without any consideration. And that the defendants then and there presented and left with him \$25 for his trouble, in spite of his remonstrance that it was no trouble at all."

That at the time of executing such release, the premises were worth \$200,000, and judgment was asked for this amount.

Defendants answered denying the allegation of the complaint of ownership in the plaintiff, and all the allegations of fraud and concealment. The referee found the execution and delivery of the deed by Miner, but that it was executed "without any false representations of any kind being made by defendants, or any of their agents, to said Miner, and without any fraud or deceit or fraudulent intent, concealment or procurement of any kind," and thereupon directed judgment dismissing the complaint. Judgment was entered accordingly.

Further facts appear in the opinion.

*T. M. Tying* for appellant. The only distinction the statute makes between legal and equitable causes of action is as to the place and manner of trial. (Code of Civil Procedure, § 1207.)

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The court must award the judgment required by the proof and findings. (*Tyng v. Com. W. Co.*, 58 N. Y. 308; *Margruff v. Muir*, 57 id. 155; *Whittlesey v. Delaney*, 73 id. 571-578; *Welles v. Yates*, 44 id. 525-531.) The bargain here was so unconscionable and of such gross inequality as naturally to lead to the presumption of fraud. (Story's Equity, §§ 244, 245, 246; Willard's Equity, 202, 203; Kerr on Fraud, etc., 186-190; *Chesterfield v. Jansen*, 2 Ves. Sr. 125; *Parmelee v. Cameron*, 41 N. Y. 392; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Dunn v. Chambers*, 4 Barb. 376; *Allore v. Jewell*, 4 Otto, 507.) The referee erred in his conclusion that the striking difference in the general capacity and intelligence of the contracting parties was "of no consequence." (*Hallet v. Collins*, 10 How. [U. S.] 174; *Sears v. Shafer*, 1 Barb. 408; *Whelan v. Collins*, 3 Cow. 537; Perry on Trusts, 160, 161.) The ambiguity of the deed is a strong badge of fraud. (*Wiswall v. Hull*, 3 Paige, 313; *Sears v. Shafer*, 1 Barb. 408.) It was not necessary that plaintiff should affirmatively prove that Mr. Riker, when he made the concededly false representations, knew them to be false and made them *animo furandi*. (*Beardsley v. Dunsley*, 69 N. Y. 577, 581; *Welles v. Yates*, 44 id. 525, 529.) Assuming that the present is an equitable action, and that the facts and circumstances proved by the plaintiff, and found by the referee at his request, constitute fraud cognizable in a court of equity, plaintiff was entitled to a judgment fastening a trust upon the proceeds realized by the defendant upon the sale of her testator's land, and requiring the defendant to account for and pay the same over to her, with interest. (Perry on Trusts, §§ 161, 163, 166-168, 171; *Wells v. Yates*, 44 N. Y. 525; *Lawrence v. Conklin*, 17 Hun, 228; Hill. on Trustees, chap. 2, marg. pp. 144, 174.) The court could not infer an intent to exclude from the grant to David Wagstaff the fee of the contiguous half of the old streets. (*Miner v. The Mayor*, 5 J. & S. 171.)

*Francis Lynde Stetson* for respondent. No principle of public policy requires the extension of lot 143 to the center of

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the road, as it had already been ascertained and declared to be the public policy of this State that the fee of the highways in the city of New York should be held by the municipality and not by adjoining proprietors. (Laws of 1691, chap. 18; 1 Smith & Liv. 18; Laws of 1789, chap. 61; 1 Greenleaf, 441; Laws of 1793, chap. 42, § 3; 3 Greenleaf, 53-54; *Drake v. H. R. R. Co.*, 7 Barb. 508-536; *Bartow v. Draper*, 5 Duer, 130-141; *Hayward v. Mayor*, 3 Seld. 314.) There is nothing in the situation of the premises granted, or of the grantors, or in the terms of the grant, to lead to the conclusion that it was the intent of the parties to this grant that it should operate in conflict with the prevailing public policy, and divest the municipality of its absolute ownership of these streets. (*French v. Carhart*, 1 N. Y. 96-103; *Blossom v. Griffin*, 13 id. 569-574; *Hutchins v. Hebbard*, 34 id. 24; *Higinbotham v. Stoddard*, 72 id. 94.) The street is, by measurement, excluded from the parcel granted. (*Higinbotham v. Stoddard*, 72 N. Y. 94-99; *Hammond v. McLachlin*, 1 Sandf. 222, 341; *Revere v. Leonard*, 1 Mass. 91; *Codman v. Evans*, 1 Allen, 443; *Chapman v. Edwards*, 3 id. 512; *Brainard v. Boston & N. Y. Cent.*, 12 Gray, 407.) The fact that the street on the south is excluded from the lot granted by the coloring of the map may be considered in ascertaining the intent of the grantor. (*Townsend v. Hayt*, 51 N. Y. 656.) The grantors were, under the recognized public policy, authorized and expected to own the fee of the streets; it cannot be supposed that as between them and one of their citizens, any grant was understood as violating this principle. (*Bartow v. Draper*, 5 Duer, 130-143; *Beckett v. Corp. of Leeds*, Law Rep., 7 Ch. App. 421; *Wetmore v. Story*, 22 Barb. 439 *et seq.*; *Dunham v. Williams*, 37 N. Y. 251-252; *Townsend v. Hayt*, 51 id. 656; *English v. Brennan*, 60 id. 609; *White's Bank of Buffalo v. Nichols*, 64 id. 65; *Mott v. Mott*, 68 id. 246.) The complaint presents a clear case of a common-law action for deceit. (*Cooley on Torts*, 475; *Bayard v. Malcolm*, 1 Johns. 453; 2 id. 550; *Thomas v. Beebe*, 25 N. Y. 244; *Witmark v. Herman*, 12 J. & S. 144-146; *Sparmann v.*

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*Keim*, id. 163-168.) The prayer for relief should be considered in ascertaining the meaning of the complaint. (Old Code, § 142, subd. 3; new Code, § 481.) A party defrauded in any contract has his choice of remedies. (*Whitney v. Allaire*, 4 Den. 554-558; *Kennedy v. Thorp*, 51 N. Y. 174; *Morris v. Rexford*, 18 id. 552; *Bank of Beloit v. Beale*, 34 id. 473; *Kinney v. Kiernan*, 49 id. 164.) But even though the prayer for relief, standing alone, might not determine the nature of the action, it is so consistent with all the allegations of the complaint as to fortify the conclusion that this is purely an action at law for deceit. (*Graves v. Spier*, 58 Barb. 349; *Long v. Warren*, 68 N. Y. 426, 427.) This action, being one for deceit, can be sustained only upon proof of the several allegations of the complaint, charging that the defendants falsely misrepresented or fraudulently concealed facts with intent to deceive, the plaintiff implicitly relying thereon. (*Marshall v. Fowler*, 7 Hun, 237; *Marsh v. Falker*, 40 N. Y. 562; *Oberlander v. Spiess*, 45 id. 175; *Meyer v. Amidon*, id. 169; *Hubbell v. Meigs*, 50 id. 480; *Hawkins v. Palmer*, 57 id. 664; *Hammond v. Pennock*, 61 id. 145, 151; *Still v. Little*, 63 id. 427; *Duffany v. Ferguson*, 66 id. 482; *I. P. & C. R. R. Co. v. Tyng*, 63 id. 653; *Haycraft v. Creasy*, 2 East, 92; *State Bank v. Hamilton*, 2 Ind. 457, 464; *Faribault v. Suter*, 13 Minn. 223-231; *Brooks v. Hamilton*, id. 26; *Botsford v. Wilson*, 75 Ill. 132; *Taylor v. Leith*, 26 Ohio St. 428; *Moore v. Noble*, 53 Barb. 425; *Weed v. Case*, 55 id. 534; *Marsh v. Falker*, 40 id. 562-565; *Meyer v. Amidon*, 45 id. 169-171; *Hubbell v. Meigs*, 50 id. 480-491; *Sparmann v. Keim*, 12 J. & S. 163; *Ellis v. Andrews*, 56 N. Y. 83; *Duffany v. Ferguson*, 66 id. 482; *Kerr on Frauds*, 57, 82, 83, 87, 90; *Elwell v. Chamberlain*, 4 Bosw. 321-335; *Bronson v. Wiman*, 8 N. Y. 182, 186, 189.) The testimony of John H. and Samuel Riker, negating the existence of a fraudulent intent was competent and material. (*Seymour v. Wilson*, 14 N. Y. 567-569; *Forbes v. Waller*, 25 id. 430-439; *McKown v. Hunter*, 30 id. 625-628; *Bedell v. Chase*, 34 id. 386-388; *Thurston v. Cornell*, 38 id. 281-287; *Cortland Co.*

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v. *Herkimer Co.*, 44 id. 22-26; *Fiedler v. Darein*, 50 id. 437-443; *Kerrains v. People*, 60 id. 221-229.) No provision of the Code relieves the plaintiff from proving the case stated in his complaint, or permits him, upon allegations of fraud, to recover for surprise or mistake. (*Hotop v. Neidig*, 17 Abb. 332; *Peck v. Root*, 5 Hun, 547; *Short v. Barry*, 58 Barb. 177; *Degraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 id. 108; *Dudley v. Scranton*, 57 id. 424; *Barnes v. Quigley*, 59 id. 265; *McMichael v. Kilmer*, 76 id. 36; § 1207 of the Code of Civil Procedure; § 275 of the old Code; *Towle v. Jones*, 1 Robt. 87; *Ryder v. Jenny*, 2 id. 56; *Boardman v. Davidson*, 7 Abb. [N. S.] 439; *Cowenhoven v. City of Brooklyn*, 38 Barb. 9-13; *Combs v. Dunn*, 56 How. Pr. 169; *Beach v. Eager*, 3 Hun, 610; *Lewes v. Mott*, 36 N. Y. 395; *Bradley v. Aldrich*, 40 id. 504; *Arnold v. Angell*, 62 id. 508; *People v. Denison*, 19 Hun, 137, 146, 147; affirmed, Ct. of App.) No judgment can be given by reason of section 120 of the Code of Civil Procedure which could not previously have been granted upon some well-defined and settled principle of relief at law or in equity. (*Heywood v. The City of Buffalo*, 14 N. Y. 534, 540; *Bouton v. City of Brooklyn*, 7 How. Pr. 198-205; *Chemical Bank v. Mayor*, 1 Abb. 79-80; *N. Y. L. Ins. Co. v. Supervisors*, 4 Duer, 192-199; *Neustadt v. Joll*, 2 id. 530; *Peters v. Delaplaine*, 49 N. Y. 362, 369, 370; 1 Wait's Pr. 27-28.) There is nothing in the complaint to suggest that damages will not fully compensate the plaintiff, or that the defendants are not able to respond in damages, nor is there any charge nor claim of a trust fund, nor any prayer for any relief which a court of law could not grant upon due proof of the facts charged. (*Bradley v. Boseley*, 1 Barb. Ch. 125, 128.) The proofs and judgment must conform to the pleadings in a suit in equity, as well as in an action at law. (*Brantingham v. Brantingham*, 12 N. J. Eq. 160-163; *Hoyt v. Hoyt*, 27 id. 402; 28 id. 485; *Bailey v. Ryder*, 10 N. Y. 363-370; *Rome Exchange Bank v. Eames*, 1 Keyes, 588-592; *Hale v. Omaha Nat. Bank*, 7 J. & S. 207; affirmed, 64 N. Y. 550.) A bill in equity charging actual fraud

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must be sustained by proof of actual fraud. (*Price v. Berrington*, 3 MacN. & Gord. 486, 498-9; *Ferraby v. Hobson*, 2 Phillips' Ch. 259; *Glascott v. Lang*, id. 310; *Montesquieu v. Sandys*, 18 Ves. 302; *Burdette v. Hoyt*, 11 Law Times, 289; *Hoyt v. Hoyt*, 27 N. J. Eq. 399; *Pierce v. Brassfield*, 9 Ala. [N. S.] 573; *Williams v. Sturdevant*, 27 id. 598; *Leighton v. Grant*, 20 Minn. 345; 1 Daniels' Ch. Pr. [5th ed.] 279; *Curson v. Belworthy*, 22 Eng. L. & Eq. 1, 5, 7, 11; 3 H. of L. Cas. 742; *Fisher v. Boody*, 1 Curt. C. C. 206, 211, 223; *Eyre v. Potter*, 15 How. 42, 56; *Graham v. R. R. Co.*, 3 Wall. 704; *Wiswall v. Hall*, 3 Paige, 313; *Tillinghast v. Champlin*, 4 R. I. 173, 192, 202.) A complainant in equity, having charged actual fraud in his bill, cannot sustain his suit upon other incidental allegations, mingled with the charges of actual fraud. (Langdell on Equity Pleading, § 63; *Tillinghast v. Champlin*, 4 R. I. 173, 201.) Even though the prayer of the complaint were to be considered broad enough to justify the exercise of any equitable power of the court adapted to the allegations of the complaint, the proof failed to present a case for equitable relief upon any ground. (*U. S. v. Arredondo*, 6 Pet. 691, 716; *Stewart v. G. W. Railway Co.*, 9 Dr. & Sm. 438; Story's Eq. Jur., chap. 6, p. 7; id., §§ 214, 245; *Mercier v. Lewis*, 39 Cal. 533; *Jaeger v. Kelley*, 52 N. Y. 274; *Sears v. Shafer*, 1 Barb. 408; *Bucklin v. Bucklin*, 1 Keyes, 145; *Harrison v. Guest*, 6 DeG., M. & G. 424; 8 H. of L. Cas. 481.) The difference in general intelligence between the parties constituted in the present case no ground for relief. (*Mann v. Betterly*, 21 Vt. 32; Shelford on Lunacy [2d ed.], 350; *Osmond v. Fitzroy*, 3 P. Wms. 129; 2 Am. Rep. 327; id. 39; *Lewis v. Pead*, 1 Ves. Jr. 19; Story's Eq. Jur., § 237; *Blackford v. Christian*, 1 Knapp, 77; *Allore v. Jewell*, 4 Otto, 506; *Howe v. Howe*, 99 Mass. 89-99; *Nexsen v. Nexsen*, 2 Keyes, 229-231; *Hewlett v. Wood*, 55 N. Y. 634.) The difference between the parties in the special information concerning the subject-matter was not in this case of the degree or character which would have justified a finding that fraud had been practiced. (*Lyon v. Richmond*, 2 Johns. Ch. 51-60; *Marble v.*

*Whitney*, 28 N. Y. 297, 308; *Jacobs v. Morange*, 47 id. 27; *Sprague v. Duel*, 11 Paige, 480; *Dambmann v. Schulting*, 75 N. Y. 55, 63; Story's Eq. Jur., §§ 210, 212, 213, 252; *Hallet v. Collins*, 10 How. [U. S.] 174; *Stettheimer v. Killip*, 75 N. Y. 282; *Long v. Warren*, 68 id. 426-431; *Bayley v. Merrill*, Oro. Jac. 386; *Starr v. Bennett*, 5 Hill, 303; *Tallman v. Greene*, 3 Sandf. 437; *Toker v. Toker*, 31 Beav. 629.) The conveyance was not executed under any circumstances of fraudulent surprise. (Story's Eq. Jur. 120; id., § 251, note 5; *Earl of Bath and Montague's Case*, 3 Ch. Cas. 56; § 251, p. 262; *Long v. Warren*, 68 N. Y. 426; *Tallman v. Greene*, 3 Sandf. 437; *Hall v. Perkins*, 3 Wend. 626; *Livingston v. Peru Iron Co.*, 2 Paige, 390.) Intent to deceive and knowledge of falsity were material issues in the case, and it was competent for the inculpatated persons to disprove such intent or knowledge by testifying to the state of mind in which they were at the indicated time. (*McKown v. Hunter*, 30 N. Y. 625-628; *Thurston v. Cornell*, 38 id. 281-287; *Fiedler v. Darrain*, 50 id. 437-443; *Kerrains v. People*, 60 id. 221-229; *Barrett v. Western*, 66 Barb. 205; *Hardt v. Schulting*, 13 Hun, 537; *Turner v. Keller*, 66 N. Y. 66-69; *Chadwick v. Fonner*, 69 id. 404-407; *Richtmeyer v. Remsen*, 38 id. 206; *Bennett v. Lake*, 47 id. 93; *Barnes v. Quigley*, 59 id. 265; *Union Bk. v. Mott*, 10 Abb. 372-376.) If the amendment to the complaint proposed by plaintiff changed the cause of action, and that was its only object, the referee had no power to authorize it. (*Bush v. Tilley*, 49 Barb. 599-605; *Hochstetter v. Isaacs*, 44 How. 495; *Chittenango Cotton Co. v. Stewart*, 67 Barb. 423; *Sinclair v. Neill*, 1 Hun, 85; *Joslyn v. Joslyn*, 9 id. 388; *Riley v. Corwin*, 17 id. 597; *Bockes v. Lansing*, 74 N. Y. 437.)

DANFORTH, J. The names of actions no longer exist, but we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either; it is only necessary that it should contain facts constituting a cause of action, and if these facts are such as at the common law his



client would have been entitled to judgment, he will under the Code obtain it. If on the other hand they establish a title to some equitable interposition or aid from the court, it will be given by judgment in the same manner as it would formerly have been granted by decree. So the complaint may be framed with a double aspect (*Wheelock v. Lee*, 74 N. Y. 500; *Hale v. Omaha Nat. Bank*, 49 id. 626; *Bradley v. Aldrich*, 40 id. 512; *Sternberger v. McGovern*, 56 id. 12; *Margraf v. Muir*, 57 id. 159); but in every case the judgment sought must be warranted by the facts stated. For as was said in *Dobson v. Pearce* (12 N. Y. 156), "the question is, ought the plaintiff to recover," or as in *Crary v. Goodman* (id. 266), "whether according to the whole law of the land applicable to the case the plaintiff makes out the right which he seeks to establish?" It is only when he fails in doing this that he can be treated as one making a false clamor. But, notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue." (Code, § 275.) He must, therefore, establish his allegations (*Salter v. Ham*, 31 N. Y. 321; *Bradley v. Aldrich*, 40 id. 504; *Heywood v. Buffalo*, 14 id. 540), and if they warrant legal relief only, he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof. (*Bradley v. Aldrich*, 40 N. Y. 504; *Arnold v. Angell*, 62 id. 508; *People's Bank v. Mitchell*, 73 id. 415.) And, notwithstanding the very learned and extended arguments advanced upon this appeal, we think the case must be decided upon the application of these rules. First, it is quite evident that the plaintiff at the outset, and before commencing his action, conceived himself entitled to damages and nothing else. For in compliance with the statute in that respect he gave notice of his claim to the comptroller and demanded "payment of the sum of \$200,000 as damages for the fraudulent obtaining and using of the deed or release," mentioned in the complaint. This being refused and action commenced, the allegations in the complaint are to the same effect.

They describe the property conveyed by the deed and characterizing the application for it as fraudulent, declare that at that time the defendant was informed the property belonged to Miner; that he was ignorant thereof, and that the defendant fraudulently and with intent to deceive and defraud the plaintiff out of his aforesaid property fraudulently kept concealed from the plaintiff "the fact of the opening of Seventy-eighth street, and also the fact of the closing of" a certain other street (both material to his title); that at the same time it falsely informed and represented to him that he had some slight claim to the said portion of said street, but that it was a mere equitable claim and of no value; that misled, deceived and induced by such fraudulent concealment, and such false and fraudulent statements and misrepresentations as to the said property, his interest therein and the value thereof, and believing the same to be true and relying thereon, and without consideration, he executed and delivered to the defendant the said deed or release; that his interest so conveyed was worth \$200,000, and for that sum judgment is demanded. If these allegations were admitted to be true, or the defendant failed to answer, the plaintiff would be entitled to recover, and the only proceeding consequent on such admission would be an assessment of damages. But so far from that, the defendant answered and by denial took issue upon the averments. For the trial of the issues so formed a jury was the appropriate tribunal, and we find that it was resorted to. (5 J. & S. 171.) Except by consent of both parties it must have been again sought; but such consent was given and we have now before us the proceedings upon a trial before a referee. His decision is to be treated like the verdict of a jury, and upon every issue he has found in favor of the defendant. He finds there was no fraud practiced, no fraudulent contrivance or concealment, no fraudulent intent on the part of the defendant or its agents. Besides this, actual good faith is established.

The whole assumed cause of action is, therefore, taken away. (*Miller v. Barber*, 66 N. Y. 558; *Arnold v. Angell*, 62 id. 508; *Long v. Warren*, 68 id. 426; *Thomas v. Beebe*, 25 id.

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Opinion of the Court, per DANFORTH, J.

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244.) Indeed it is shown to have had no existence. The General Term, by whom the evidence is weighed and examined, have approved the findings of the referee, and the judgment directed by him has been affirmed. These findings having been made upon conflicting evidence, or evidence altogether in favor of the defendant, are conclusive upon this court. (*Quincey v. White*, 63 N. Y. 370; *Leonard v. N. Y., etc., Tel. Co.*, 41 id. 544, 568; *Stilwell v. Mutual Life Ins. Co.*, 72 id. 385.) Nor do we find that any error was committed by the referee in refusing additional findings at the request of the plaintiff. The questions presented were either included in the findings already made, or depended upon inferences to be drawn from evidence not conclusive, and in neither case can those exceptions be sustained. (*Andrews v. Raymond*, 58 N. Y. 676.) Notwithstanding this brief statement of our conclusion, we have been compelled, in arriving at it, to examine the entire evidence and the elaborate and interesting briefs of counsel; and in view of the appellant's position, that the case presented matters of equitable cognizance, it may be not improper to state that it seems to us far from clear that the circumstances are such as to require the strictness of the common law to be abated, or that upon pleadings, however framed, the plaintiff could recover. There was actual possession of the land by other parties, and as it now seems, equities affecting the conscience of the intestate, if they did not the title, and these circumstances may have led to that prompt and almost eager compliance with the defendant's application, which is now relied upon as the result of fraud or imbecility. But without regard to such considerations and upon the ground before stated, we think that the appeal is not sustained, and that the judgment should be affirmed.

All concur.

Judgment affirmed.

## JAMES S. T. STRANAHAN et al. Appellants, v. THE SEA VIEW RAILWAY COMPANY OF CONEY ISLAND, Respondent.

The provision of the general railroad act (§ 28, chap. 140, Laws of 1850), giving to every railroad company authority to construct its road across any street or highway which the route of its road shall intersect, was not repealed by implication by the acts of 1869 and 1874, providing for the laying out of the highways or avenues, known as "Ocean Parkway" (chap. 861, Laws of 1869; chap. 583, Laws of 1874), so far as it pertains to those highways; they are highways within the meaning of the railroad act, and railroads have the same authority to cross them as they have to cross other highways.

The act of 1871 (chap. 600, Laws of 1871), declaring that "no railway upon which locomotive steam shall be used, or is or shall be authorized or intended to be used as a motive power," shall be constructed across certain avenues therein mentioned, without the approval of the State engineer, has no application to that portion of "Ocean Parkway" constructed under said act of 1874.

The said act of 1871 has reference to railroads moving cars in the ordinary way by means of locomotive engines, it does not include railways moving their cars by a propelling rope or cable attached to stationary power. Accordingly, *held*, that a railroad corporation organized under the act of 1866 (chap. 697, Laws of 1866), for the purpose of constructing an elevated railroad to be operated "by means of a propelling rope or cable attached to stationary power," had authority under the said provision of the general railroad act, which by said act of 1866 is made applicable to corporations organized under it, to cross that portion of "Ocean Parkway" constructed under the act of 1874, which was intersected by the route of its road.

(Argued February 3, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December 30, 1880, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from constructing its road across the highway or avenue in Kings county known as "Ocean Parkway."

The facts appear sufficiently in the opinion.

## Statement of case.

*B. F. Tracy* for appellants. The declaration of the act authorizing the construction of the Ocean Parkway that it is a highway, means only that it is a highway in a limited sense, and not one to be especially made subject to the provisions of the general railroad act (Laws 1850, chap. 137), as to the running of a railroad over, along or upon it. (Laws 1874, chap. 583, §§ 2-11; Laws 1875, chap. 489, §§ 8, 14; Laws 1876, chap. 352, § 7.) The land embraced in the Parkway having been acquired and taken for a public use inconsistent with its use for railroad purposes, railroads cannot now be constructed across, along or upon it. *In re B. & A. R. R. Co.*, 53 N. Y. 574, 578, 589; *In re City of Buffalo*, 68 id. 167; *In re Roch. Water Commrs.*, 66 id. 413; *In re N. Y. & B. B. R. Co.*, 20 Hun, 201; *Mills' Em. Dom.*, chap. 5, § 45.)

*Jesse Johnson* for respondent. The defendant has the right to construct its road across the highway in question. (6 Edmunds' Statutes, 809, § 2; 3 Edmunds' Statutes at Large [2d ed.], 627; 6 id. 367.) Ocean Parkway is a highway, within the meaning of section 28 of the General Railroad Act. (Laws of 1874, § 1, p. 781; id. 783, § 7; *Washington Cemetery v. The Prospect Park & Coney Island R. R. Co.*, 68 N. Y. 591; *Matter of the N. Y. C. & H. R. R. Co.*, 77 id. 256, 259, 260.) A provision in the act of 1874, devoting thirty feet on either side of the main highway to court-yard purposes, has no relation to or effect on the construction of railroads. (*Matter of Commrs. of Central Park*, 50 N. Y. 493, 497.) The provision that "no building or erection" shall be placed on the court-yard states but meagerly and imperfectly the rule of the common law as to highways. (*Whetmore v. Tracey*, 14 Wend. 250.) It cannot be claimed that because the park commissioners have the power to govern and control the highway they have the power to prevent railroads from crossing it. (*Dunham v. Trustees of Rochester*, 5 Cow. 462; *Thompson v. Schoonmaker*, 2 Seld. 92; 1 Abbott's Digest of Law of Corporations, 512, beginning at part 322.)

EARL, J. The determination of this case depends upon the construction of various acts of the legislature, the first of which is the act chapter 861 of the Laws of 1869, entitled "An act to lay out and improve a public highway or avenue from Prospect park, in the city of Brooklyn, toward Coney Island, in the county of Kings." That act authorized and directed the Brooklyn park commissioners to lay out a public highway or avenue, not more than two hundred and ten feet wide, from Prospect park to the lands of the Prospect Park Fair Grounds Association, and to acquire lands for, and to open and grade the same, and conferred the exclusive charge and management of the same upon them after it was opened. And the act provided that no buildings or other erections, except porches, piazzas, fences, fountains and statuary, should remain or be placed upon the avenue within thirty feet from the outside lines thereof; which space on each side of the avenue should be used for court-yards only, to be planted with trees and shrubbery, and otherwise ornamented at the discretion of the respective owners or occupants thereof. The next act is chapter 583 of the Laws of 1874, entitled "An act to lay out and improve a public highway, or avenue and concourse, in continuation of a public highway or avenue heretofore laid out from Prospect park, in the city of Brooklyn, toward Coney Island, in the county of Kings." That act authorized and directed the park commissioners to lay out and improve a public highway or avenue, commencing where the avenue opened under the prior act terminated, of the same width as that avenue, and continuing the same across Coney Island to the Atlantic Ocean; and it also authorized them to lay out, open and improve a concourse or shore road, at the southerly terminus of the avenue thus to be opened, six thousand feet in length along the ocean beach and five hundred feet wide, and to acquire the lands for such avenue and concourse; and it placed the avenue and concourse under their exclusive charge and management. The act also contained the same provisions as to the land on each side of the avenue, to the extent of thirty feet in width, as were contained in the prior act.

In neither of the acts thus far cited was a name given to the avenue authorized to be constructed. But in the act (chap. 489 of the Laws of 1875), which amended the act of 1874, the avenue authorized to be constructed under the act of 1874, was called the "Parkway." In the amendatory act, the commissioners were authorized to lay out the concourse one thousand feet wide instead of five hundred as previously authorized.

The act of 1874 was again amended by the act (chap. 352 of the Laws of 1876), and in that act the whole avenue from Prospect park to the ocean is called the Ocean Parkway, and by that name the avenue has been known.

The defendant is a corporation organized in 1880, under the act (chap. 697 of the Laws of 1866), which is an act supplementary to the general railroad act of 1850. That act authorizes the formation of companies for constructing, maintaining and operating railways for public use "in the conveyance of persons and property by means of a propelling rope or cable attached to stationary power;" and it confers upon the companies organized under it all the powers and privileges, and subjects them to all the liabilities mentioned in the general railroad act of 1850, so far as comprised in the first twenty-six sections and the twenty-eighth section thereof. The defendant's road is an elevated railroad, and prior to the commencement of this action, it had lawfully constructed its road on each side of the avenue to the exterior lines thereof, and it was about to construct its road across the avenue at an elevation of twenty-two feet above its surface about seven hundred feet northerly of the concourse. The method of construction intended as found at the Special Term was as follows: "By constructing a bridge (which is to constitute a part of said railroad) of iron or steel twenty-two feet above its surface with seventy feet spans and having supports on said highway on either side of the main drives, and on the exterior lines thereof, and in the portion of said highway or avenue by said acts, provided to be used for a court yard on either side thereof, and not otherwise and that the defendant offers to build said bridge in such an ornamental manner as may be desired."

The plaintiffs commenced this action to restrain the construction of the railway over the avenue, and now contend that they were improperly defeated in the court below for several reasons which must now receive consideration.

The general railroad act of 1850 (chap. 137, § 28), gave every railroad company authority to construct its road across any street, highway, plank-road or turnpike which the route of its road shall intersect, and the defendant has the benefit of this provision by virtue of the act of 1866. The plaintiffs contend that this provision, so far as pertains to the Ocean Parkway, was repealed by implication by the acts of 1869 and 1874. Repeals by implication are not favored, and we can find nothing in the acts referred to showing a legislative intention to deprive railroads of the authority to cross this highway which they have to cross other highways. The right to cross the avenue by a railroad is certainly not so inconsistent with the right of the public to use it for the purposes intended by the acts of 1869 and 1874, that the two rights cannot stand together. We cannot say even that the crossing proposed will, to any great extent, mar the beauty of the avenue or impair its usefulness for the purposes intended.

It cannot be denied that the Ocean Parkway is a highway. It is called so in the acts of 1869 and 1874, and it was built and is maintained like other streets and highways, except that it is placed under the charge of the park commissioners instead of the authorities having charge of other highways. While it, doubtless, has an intimate connection with Prospect park, it is no part of the park. It is a highway within the meaning of the general railroad law.

It is also claimed that because the land for the Ocean Parkway has been acquired for one public use, it cannot be taken for another without express legislative authority. But there is express legislative authority. It is found in the provision of the act of 1850, above cited, and hence the authorities cited by the learned counsel for the plaintiffs (*In re City of Buffalo*, 68 N. Y. 167, and *In re Boston & Albany R. R. Co.*, 53 id. 574), are not applicable.



The defendant can, therefore, build its railroad over this highway unless forbidden by something contained in the act (chap 609 of the Laws of 1871). That act provides, that "no railway upon which locomotive steam shall be used, or is or shall be authorized or intended to be used as a motive power," shall be constructed across Flatbush avenue, Ocean avenue, Coney Island Plankroad, Coney Island boulevard, Franklin avenue boulevard, the Second, Third, Fourth and Fifth avenues in any of the towns of Kings county, without the approval of the State engineer as provided in the act. It is undisputed that no application has been made to and no action taken by the State engineer under that act. The defendant claims that the act has no application to that portion of the Ocean Parkway over which it proposes to construct its road, and that it has no application to its railway.

The Parkway is not mentioned in that act, and, looking at the act alone, it is difficult to perceive that it pertains in any way to the Ocean Parkway. But it is claimed that Coney Island boulevard is the same highway known as the Ocean Parkway, so far as the same was constructed prior to the act of 1871, and that may be assumed. That act, however, has no application to so much of the Ocean Parkway as lies south of the lands of the Prospect Park Fair Grounds Association. That part was constructed after 1871, under the act of 1874. The act of 1871 had reference to boulevards and avenues then in existence. The act of 1874 was not an amendment of the act of 1869. It does not even refer to that except for the purpose of specifying the starting point of the highway thereby authorized to be constructed. It is a full and complete act by itself. It is true that the highway authorized to be constructed by the act of 1874 is a continuation of that authorized to be constructed by the act of 1869, and that the acts are quite similar, and that each places the highway which it authorizes to be constructed under the same management and control. But what was known as Coney Island boulevard in 1871 did not embrace the highway which the defendant proposes to cross with its railroad. It does not appear that the continua-

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Statement of case.

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tion of the Parkway was even contemplated before 1871, or that the continuation was part of any system before that time devised. We are, therefore, unable to perceive how that act can be made to apply to this case.

But there is still another answer to the application of the act of 1871 to this case. That act only applied to a railway upon which locomotive steam shall be used as a motive power. It plainly has reference to railways moving cars in the ordinary way by means of locomotive engines. It has no reference to railways moving their cars in any other way, as by horses, or by a propelling rope or cable attached to stationary power, the mode of moving its cars proposed by the defendant. A stationary engine is not a locomotive engine and does not, according to general understanding, use locomotive steam. Locomotive steam is such as is used in a locomotive engine, and a locomotive engine is one which moves cars by its own forward and backward motion.

We are, therefore, of opinion that the decision in this case was plainly right, and that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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JAMES D. McCABE, as Administrator, etc., Appellant, v. MOSES F. FOWLER et al., Executors, etc., Respondents.

An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs.

N., in his life-time, left certain United States bonds in the hands of O. for safe keeping, who was at the time responsible, of good character and considered entirely trustworthy. N. died in 1865, leaving a will by which his widow was appointed executrix, and W., defendant's testator executor. The latter qualified, the former did not until after the death of W. The bonds were converted into other bonds which remained in the custody of O. until W. died in 1871. W. also left securities of his own

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in the hands of O. After the death of W. the widow of N. qualified as executrix, but no letters testamentary were issued to her. Her attorney took charge of the estate; no call was made upon O. to deliver up the bonds; after his death, which occurred in 1875, it appeared that in 1874 he hypothecated the bonds as collateral for a loan made to a firm of which he was a member; said firm, including O., were insolvent. In an action to charge the estate of W. with the amount of the bonds so lost to the estate of N., *held*, that there was no negligence or want of care and vigilance on the part of W. such as would authorize a recovery. *Walton v. Walton* (1 Keyes, 18; 2 Abb. Pr. [N. S.] 428), distinguished.

(Argued February 4, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendants, entered upon a decision of the court, on trial without a jury.

The nature of the action and the facts are set forth sufficiently in the opinion.

*I. T. Williams* for appellant. Defendants' testator did not exercise that care, diligence, prudence and caution in the care, management and preservation of the bonds, which he was by law bound to exercise, and his executors are liable. (*Walton v. Walton*, 2 Abb. [N. S.] 428; 1 Keyes, 15; *Montgomery v. Dunning*, 2 Bradf. 220; *Thompson v. Thompson*, 1 Bradf. 24; Redfield on Wills, 389; Bouv. Law Dict., art. Negligence; *Powell v. Evens*, 5 Ves. 838, *Caffrey v. Darby*, 6 id. 487; *Schultz v. Pulver*, 11 Wend. 361, 365; *Baskin v. Baskin*, 4 Lans. 90, 93, 94; Dayton on Surrogates, [3d ed.] 294-7, 519-520; *Brazier v. Clark*, 5 Pick. 94; 4 Barb. 626; *King v. Talbot*, 40 N. Y. 76; 14 Hun, 291; *Orcut v. Orcut*, 3 Paige, 459; *King v. King*, 3 Johns. Ch. 552.) The bonds were personal property, chattels for which replevin would lie. (*Bovet v. Masson*, 1 Den. 69.) Fowler's liability attached at the time of his omission or neglect to have the bonds secured by Odell and remains till released, and his representatives must answer for it from his assets of his estate. (*Walton v. Walton*, 2 Abb. [N. S.] 428; 1 Keyes, 15.) Plaintiff having put in evidence his letters, issued by the surrogate of this county under seal of

office without objection, showed a *prima facie* right to bring the action, and if the defendants dispute this right the burden of proof is on them to impeach the letters, or otherwise to get rid of them. (*Broderick's Will*, 21 Wall. [U. S.] 503; 2 R. S. [ed.], § 56, p. 82; 16 N. Y. 185; *Flur v. Chase*, 4 Den. 85, 90; *Dale v. Roosevelt*, 8 Cow. 333, 348-9; Willard on Ex'rs, 145-6; Phillips on Ev. no. 620, p. 86+; no. 769, p. 1120; 6 Cow. 49+; *Parham v. Moran*, 4 Hun, 718-19; *Belden v. Meeker*, 47 N. Y. 307-10; *Farley v. McConnell*, 7 Lans. 428-31; 52 N. Y. 630.)

*Calvin Frost* for respondents. Defendants' testator cannot be charged with less care and prudence in his representative than in his individual character, because he exercised the same care and prudence in the management of the Fish estate as in the management of his own property. (Redfield's Law & Practice, Surrogates Court, 520; Dayton on Surrogates, [3d ed.] 522-23.) Defendants could not be charged with the loss of the bonds several years after Mr. Fowler's death, they never having had any authority to take them, or interfere with them. (*Shook v. Shook*, 19 Barb. 656; 3 R. S. [6th ed.], § 11, p. 733.) As sole surviving executrix Mrs. Fish was entitled to the exclusive possession of the property. (*Shook v. Shook*, 19 Barb. 653; 3 R. S. [6th ed.] § 18, p. 74.) As such executrix she derived her power and authority not from letters testamentary, but from the will. (*Hastnett et al. v. Wandell*, 60 N. Y. 349, 350.)

MILLER, J. The plaintiff in this action seeks relief against the estate of William Fowler, deceased, for the negligence of the testator as an executor of the estate of Nathaniel Fish, deceased, in failing to collect certain government bonds belonging to said Fish's estate. These bonds were left and deposited for safe keeping by Fish in his life-time with one Odell, his nephew, who purchased the bonds for Fish and was at the time a man of responsibility, good character and business habits, and considered entirely trustworthy. Upon the death of Fish in 1865, Fowler qualified as executor of his will and assumed to act in

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that capacity. His widow, who was executrix, did not qualify or renounce during the life of Fowler, and the bonds deposited were converted in 1867 into five-twenty bonds, which remained in the hands of Odell, he transmitting the interest to Fowler, as he had previously done, until Fowler died in October, 1871, leaving a will. His executors called upon the surrogate for advice, and upon being informed that Mrs. Sarah Fish, the widow and surviving executrix named in the will of her husband, should qualify, according to the findings of the judge, an oath as executrix was prepared, and she being indisposed at the time, was sent to her residence, and she subscribed and swore to the same on the 18th of January, 1872, before a notary, which oath was filed in the office of the surrogate and a memorandum of the same entered in the blank book of oaths, where it should have appeared if it had been taken in the office. The letters testamentary were not issued to Mrs. Fish, but she acted as executrix and executed a power of attorney to one John B. Fowler, who took charge of the estate, collected and paid over the interest to her, she being under the will entitled to the income during her life, until Odell's death in 1875, and as residuary legatee to one-half of the principal. It then appeared that in 1874 the bonds were hypothecated by Odell as collateral security for a loan made by the firm of which he was a member, and the firm, including Odell, turning out to be irresponsible, the bonds were lost to the estate of Fish.

It will be observed that up to the time of the decease of William Fowler, so far as the evidence shows, there was no reason to suppose that the bonds in question were unsafe, or in any peril of being lost, while in the possession of Odell. Nor do we think that there is any valid ground for claiming that Fowler was negligent, or failed to bestow upon the property committed to his charge that degree of care, attention and vigilance which was essential for its safety and preservation, and which he was bound to exercise as a lawful custodian of the same. He had acted the same as the testator, Mr. Fish, had done in leaving them with Odell, and as the proof shows, he had also left with Odell his own securities of a like nature.

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An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge, and does not warrant such safety under any and all circumstances, and against all contingencies, accidents or misfortunes. The true rule which should govern his conduct is, that he is bound to employ such prudence and such diligence in the care and management of the estate or property as in general prudent men of discretion and intelligence employ in their own like affairs. (*King v. Talbot*, 40 N. Y. 76.) While this rule requires an executor or trustee to avoid all extraordinary risks in the investment of the moneys of the estate and to keep the same safely, it does not demand that he shall be made liable for contingencies which, under ordinary circumstances, could not have been anticipated. There is nothing in the record before us which evinces that the bonds in question were liable to be lost in Odell's custody, and, as the case stands, that they were not entirely safe up to the period of the death of William Fowler. At this time they had not in any way been misapplied or improperly used, and there is no ground for claiming that Odell was an improper person as a depository of the bonds. Both Fish and Fowler had no reason to believe to the contrary, and Fowler, as executor, was only following the course pursued by Fish in leaving the bonds where he found them. He did the same with his own bonds, thus evincing his confidence in Odell and his entire good faith. It does not excuse him if negligent because Fish had acted in like manner; but in view of the circumstances it cannot, we think, be said that he did not act as a person of ordinary prudence and care would have done in regard to his own affairs, or that he was negligent. If Fowler, the executor of Fish, for any reason had cause for suspicion or doubt as to Odell's integrity or financial ability to respond for any loss or misappropriation, or if it had appeared that Fowler knew that Odell was in failing circumstances, a different question would arise, and it might well be urged that he had conducted himself without that caution and care which his duty as trustee demanded; but the facts presented lead to the conclusion that there was no just ground for apprehension of loss

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in consequence of Odell's delinquency or want of responsibility during Fowler's life, and there is no reason to doubt that the bonds were in existence and entirely safe and secure up to the period of Fowler's death and for some years subsequent thereto. Such being the state of the case, the proof should be very clear showing neglect on the part of Fowler while he was alive, to hold his estate chargeable for the loss which occurred after his decease. His executors had no control over the bonds, no authority to interfere with the estate of Fish, and no right to the custody of or to receive or take charge of the bonds in any form. (2 R. S. 448, § 11; *Shook v. Shook*, 19 Barb. 653. By Fowler's death they had passed from him as executor into the hands of Mrs. Fish, the surviving executrix or trustee, or to such person who might be appointed by the surrogate to administer upon the estate. The court found that Mrs. Fish qualified as executrix, and there is, we think, sufficient evidence to support this finding. And although no letters testamentary were issued to her, she assumed to act and took charge of the property belonging to the estate of her husband. That letters were not issued can make no difference so long as she was entitled to the same. She had authority as executrix and as a trustee under the will of her husband to take charge of the property belonging to the estate, and the subsequent issue of letters of administration to the plaintiff did not, if she was qualified, supersede her acts or in any way interfere with her rights. The subsequent appointment of the plaintiff is not important if Mrs. Fish duly qualified and acted as executrix, and cannot affect her acts so far as they relate to taking charge of the bonds in controversy. Nor does any question of estoppel, as to the right of the defendants to set up as a defense that Mrs. Fish was an executrix and acted as such, arise on this appeal.

Assuming, however, that Mrs. Fish was not authorized to act as surviving executrix under her husband's will, then it was the right of those who were interested in the estate to obtain letters of administration with the will annexed. (2 R. S., 71, § 17.) If this had been done, the bonds could have been obtained at once and no loss would have occurred. As Mrs.

Fish, while enjoying the income and having the control over the bonds, did not assert her right to the custody of the same, or if she had no right, the appointment of an administrator with the will annexed was not applied for or made for a long time, the loss was not caused by the neglect of Fowler as executor of Fish, but by the failure of the parties in interest to avail themselves of the right, they had to take and secure the bonds. The negligence was with them and the loss was occasioned by their fault, as they had it in their own power to protect themselves.

The case of *Walton v. Walton* (1 Keyes, 18 ; 2 Abb. Pr. [N. S.] 428), cited by the appellant's counsel, differs essentially from the case at bar. The action was brought by an administrator to compel the executors of the deceased executor of the estate which the plaintiff represented to account for assets unadministered in his hands, but there was no surviving executor into whose hands the property had been delivered, and the defendant's testator had in his possession the property of the estate unaccounted for at the time of his death. Besides there was no question involved as to the negligence of the executor, or as to the right of the parties in interest to administer upon the estate.

There is, we think, no valid ground for claiming that the bonds inventoried never came into the hands of Odell, and the bonds hypothecated by Odell and sold for the payment of the loan were not those referred to in the inventory and lost to the estate. The findings of the court are in a contrary direction and are sustained by sufficient evidence.

A number of questions were raised upon the trial in regard to the admission of evidence, but none of the rulings of the judge in reference to the same show any such error as demands a reversal of the judgment.

The question made as to giving costs against the estate of Nathaniel Fish, related to the discretion of the judge and is not the subject of review upon this appeal.

The judgment should be affirmed.

All concur. FOLGER, Ch. J. and EARL, J., concurring in result.  
Judgment affirmed.



## Statement of case.

ROBERT M. IRELAND, Respondent, v. ROBERT IRELAND, as  
Executor and Trustee, Impleaded, etc., Appellant.

The will of I. gave his residuary estate, after the death of his wife, to his son R. in trust, among other things, to apply one-half of the net income to the use and for the maintenance and support of said R., his wife and children during the life of R. R. had at the date of the will and of the death of his mother, which occurred in 1874, a wife and one child (the plaintiff) who was married in 1875, and at and prior to the commencement of this action, was living separate from his father, having a household of his own, and their relations were not amicable. In an action for an accounting, etc., *held*, that the beneficiaries named were not each absolutely entitled to one-third of the net income of the trust estate; that there was a discretion conferred upon the trustee as to its application, but not an uncontrolled discretion; that, under the circumstances of the case a court of equity had power to direct how the discretion should be exercised; that there being no evidence of a refusal on the part of R. to support plaintiff in his family, or that plaintiff until just before the commencement of the action demanded any portion of the income or any support or maintenance therefrom or that he needed any of it for his support, it was to be deemed that he had acquiesced in the manner of its application; and that therefore he was not entitled to any portion of the income accruing prior to the commencement of the action; but that he was entitled to one-third of the net income thereafter.

The wife of R., who was made a defendant, separated from him in 1876 on account of improper treatment; in 1877 she commenced an action for divorce from bed and board, and obtained judgment in 1878, with an allowance of \$1,000 annually for alimony. This R. paid, and also paid his wife's board and expenses up to the time of the judgment. *Held*, that she was not entitled to be allowed any thing prior to the commencement of the action, but thereafter was entitled to one-third of the income, deducting however, therefrom, the amount of the alimony since accruing.

*Ireland v. Ireland* (18 Hun, 362), reversed.

(Argued February 4, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 13, 1880, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. (Reported below, 18 Hun, 362.)

## Statement of case.

The nature of the action and the facts are set forth sufficiently in the opinion.

*C. Frost* for appellant. The application of the income rested in the discretion of the executor, and the court cannot interfere with the exercise of such discretion unless it appears that the executor is acting *mala fide*. (*Withers v. Yeaddon*, 1 Rich. Eq. [Ct. of App. S. C.]; *Collins v. Carlisle*, 7 B. Monr. [Ky.] 13; *Chamber v. Atkins*, 1 Simons & Stuart, 382; *Mason v. James et al.*, 3 Edw. Ch. 497; *Bunner v. Storm*, 1 Sandf. Ch. 358; *French v. Davidson et al.*, 3 Madd. Ch. 396; *Miller v. Miller et al.*, 5 id. 424.) The plaintiff by his omission to demand any part of the trust fund until just before the commencement of this action, his possession of ample means and his presumed knowledge of his father's mode of living, must be deemed to have acquiesced in the breach of trust, if any there was. (*Brice v. Stokes*, 11 Ves. 318; *Lankford v. Gascoque*, id. 325; *Thompson v. Finch*, 22 Beav. 324; *Sherman v. Parish*, 53 N. Y. 483; *Phips v. Pennefather*, 8 Irish Eq. 486-7; Lewin Law of Trusts [7th ed.], 789; Perry on Trusts, § 850.) The question of maintenance, under such a trust, is one depending upon the necessities of the beneficiaries. (*Kearsley v. Woodstock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533; *Carr v. Lining*, 28 id. 647; *Camden v. Benson*, 4 Law J. [N. S.] 256.) Plaintiff having reached his majority and left his father's house is not entitled to any share in this fund. (*Carr v. Lining*, 33 Beav. 474; 28 id. 647.)

*I. T. Williams* for respondent Anna S. Ireland. The "net income" should be divided equally among Robert, Anna S. and Robert M. Ireland, each receiving one-third. (*Foose v. Whitman*, Alb. Law J. of Dec. 11, 1880; *Chase v. Chase*, 2 Allen [Mass.], 101; *Smith v. Bowen*, 35 N. Y. 83; *Jubber v. Jubber*, 9 Sims. 503; *Woods v. Woods*, 1 Mylne & Craig, 401; *Franklin v. Schermerhorn*, 18 Hun, 112; *Hilton v. Bender*, 69 N. Y. 86; *Raikes v. Ward*, 1 Har. Ch., 445; *Ireland v. Ireland*, 18 Hun, 362.) When income arising from property is left to a

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person for the maintenance of children, he will be entitled to retain it for that purpose only so long as he continues properly to maintain them. (*Chase v. Chase*, 2 Allen [Mass.], 101.)

*Edward C. Delavan* for respondent Robert M. Ireland. When an estate or an income is given to support and maintain parents and children they share equally in the fund. (*Smith v. Bower*, 35 N. Y. 83; *Jubber v. Jubber*, 9 Sims. 503; *Woods v. Woods*, Mylne & Craig, 401; *Franklin v. Schermerhorn*, 8 Hun, 112; *Hilton v. Bender*, 69 N. Y. 86.) Where a trust is created, and the trustee is one of the *cestuis que trust*, all the *cestuis que trust* share equally, and any one may enforce the trust as against the trustee. (*Raikes v. Ward*, 1 Hare's Ch., 445; *Chase v. Chase*, 2 Allen [Mass.], 101; *Ireland v. Ireland*, 18 Hun, 362.) When a trustee is one of the *cestuis que trust*, the court will construe the terms of the trust most strongly against him. (*Matter of Moak*, 2 Redf. Surrogate, 429; *Perry on Trusts*, § 59.) A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law. (*Bucklin v. Bucklin*, 1 Keyes, 141-148; *Willard's Eq. Jur.* 423.) Property acquired by the *cestuis que trust*, outside of the will, does not invalidate their right to share in the income under the will. (1 Redf. on Wills, 429-30.) By no reasonable construction of the terms of the will, taken as a whole, will it warrant the conclusion that the trustee was to exercise a discretion as to the manner or amount of applying the fund to the use, etc., of the wife and children. (1 R. S. 729.)

EARL, J. This action was brought to compel an accounting by the defendant Robert Ireland, as trustee under the will of William B. Ireland, deceased, and the other defendant was made a party to the action on account of her interest in the trust. The material facts bearing upon the controversy between the parties are as follows:

William B. Ireland, a resident of the city of New York, died in the year 1865, leaving a will, executed the

previous year, in which, after some specific bequests to his wife, he devised and bequeathed all the residue of his property to his wife for life, and appointed her sole executrix of his will. From and after her death, he devised and bequeathed all the property of which she was to have the use for life to his son Robert, the defendant, whom he appointed sole executor of his will after her death to have and to hold the same upon trust to receive the rents, profits and revenue arising therefrom, and to apply one-half of the net income thereof "to the use and for the maintenance and support of his son William John Ireland, his wife and children, during the natural life of his said son William John, and to apply the remaining half of said net income to the use and for the maintenance and support of his son Robert Ireland, his wife and children, during the life of his said son Robert."

The testator, at his death, left his wife and the two sons named, surviving. His wife took letters testamentary upon the will and lived until September, 1874, when she died, and then letters were issued to the defendant Robert. William John died before his mother, leaving several children, but no question arises in this case as to their interest under the will.

The defendant Robert has now, and had at the date of the will, one child, the plaintiff, who at that date was about fourteen years old. The plaintiff was married about the year 1875 and had one child. His wife and child were living at the commencement of this action, but his wife has since died. At and prior to the commencement of this action he was living separate from his father, having a household of his own, and he was apparently not on friendly terms with his father.

The defendant Anna S. is the wife of the defendant Robert, married to him in 1851, but she is not the mother of the plaintiff. She lived with her husband until July, 1876, when she separated from him on account of his improper treatment of her and has never since lived with him. In June, 1877, she commenced an action against him for separation from bed and board and obtained judgment of separation in May, 1878, with an allowance for alimony of \$1,000 annually, payable in

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quarterly payments, besides counsel fees. Since that time Robert has paid the alimony and he also paid his wife's board and other expenses intermediate the times of her separation from him and the judgment of separation. The property which came into the hands of Robert as trustee for himself, wife and children, was about the sum of \$78,000, consisting of real and personal property and the net income thereof from the death of his mother to October, 1, 1879, was \$21,838.04.

The plaintiff claims that he is entitled to recover one-third of the net income of the trust estate from the death of his grandmother in September, 1874, and so the Supreme Court has decided (18 Hun, 362); and the defendant Anna S. claims that she is also entitled to one-third of the net income from the same date, and so the Supreme Court has decided, except it holds that she is entitled to no portion of the income during the time, after that date, when she lived with and was maintained by her husband in his family; and she has appealed from the decision of the Supreme Court so far as it is thus adverse to her. The defendant Robert has appealed from the decision so far as it is adverse to him, and he claims that his wife and son are not entitled each to receive from him one-third of the net income, and that, if so entitled, he has a discretion to exercise in the application of such income which cannot, upon any facts alleged or appearing in this case, be interfered with.

I have made a very thorough search among decided cases and can find none sufficiently like this to serve as a guide in our present decision. The conclusion which should be reached is not free from doubt. But we must, as well as we can, ascertain the intention of the creator of this trust and then, by applying broad principles of equity to the facts of this case, endeavor to reach a conclusion which will come nearest to exact justice between these parties.

It cannot be denied that the testator meant to confer upon the trustee some discretion in the application of the net income. The language used, "to apply to the use and for the maintenance and support" of the beneficiaries, imports this. But it is

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not an uncontrolled discretion. A court of equity, by virtue of its general jurisdiction over trusts and trustees, can, upon a proper state of facts, direct how their discretion shall be exercised ; in other words, how the trust fund shall be administered. It can, upon sufficient grounds, remove a trustee and appoint another, and, in case a trustee is proceeding to dispose of the trust fund improperly or inequitably, it can intervene and control his conduct. But when a trustee, with the powers conferred upon this trustee, is acting, in administering his trust, within the limits of a fair and reasonable discretion, a court of equity cannot intervene except for very peculiar reasons calling for the exercise of its jurisdiction.

The trust created for William John, his wife and children, is precisely the same as that created for Robert, his wife and children. It is not a just inference, from the language used, that the testator meant that each of the beneficiaries of the trust fund should take an equal part thereof, or have an equal share applied to his or her use. If that had been intended, different language would have been used. William John had a wife and seven children, thus making nine beneficiaries in the one-half of the net income. It would be quite absurd to suppose that the testator intended that the trustee should divide the one-half of the net income into nine parts and apply one of such parts to the use and for the maintenance and support of each of the nine beneficiaries. The intention undoubtedly was that such income should be applied for the support and maintenance of the nine persons as one household. The trustee could make the application by himself paying out the money for their support and maintenance, or he could discharge his trust by paying it over to the head of the family, not shown to be an improper person, to be by him expended for that purpose. No member of the family could claim any particular sum as his or her portion of the trust fund. But the application of the fund could be made in the ordinary way for the general support of the household. This I think would come nearest to the intention of the testator. If, for any reason, any one of the children left the family home and

needed support elsewhere it may be that he would be entitled to a share of the fund but not necessarily to one-ninth part thereof. If one were sick or infirm or for any other reason needed more for support and maintenance than another, the trustee could undoubtedly in the exercise of his discretion apply more of the fund to the use of such one than to the use of another.

When the will was made the testator had in mind the family of Robert, consisting of himself, his wife and son, and such other children as he might have, and he expected and intended that Robert as trustee should apply one-half of the net income to the use of himself, wife and children in the same way that he would apply his own funds for the same purpose. He was to use the net income for the support and benefit of his family. He was not obliged to divide the income into three parts and apply one-third thereof to the use of his son, and one-third thereof to the use of his wife, reserving just one-third for his own use. He could apply it as their necessities required. There was no particular sum or proportion of the whole income which either could require. So long as his wife and son were members of his household, or so long as he was willing they should be, a court of equity could not interfere with his discretion in the application of the income except upon proof of bad faith or misconduct or some exceptional facts calling for the exercise of its jurisdiction.

After the death of the testator's widow in September, 1874, it does not appear that the plaintiff lived for any considerable time with his father, or that he was supported by his father, except that his father gave him in money at one time \$200. There is no evidence that his father refused to support him in his family, or that until just before the commencement of this action he demanded any portion of the income or any share therein, or any support or maintenance therefrom, or that he needed any of it for his support. The income was received by the trustee and expended for the support of himself and family. Under such circumstances we are of opinion that the plaintiff must be deemed to have assented to the manner in which the income

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was applied. There was no certain portion of it which he was entitled to. How much should have been applied to his support and maintenance would have rested very much in the discretion of the trustee which he would have exercised in view of the sum needed for the proper support of himself and wife. It seems to us quite unjust now to allow the plaintiff to recover one-third of the net income for the whole time since the death of his grandmother. The better rule, we think, is to give him one-third of the net income from the commencement of the action. An interference thus far with the discretion of the trustee may be justified upon the following grounds: The plaintiff has left his father's house, has lived away from it for some years, having a family of his own, and seems to be competent to be intrusted with his share of the income. The relations between him and his father are not amicable. There is nothing in the circumstances of the trustee that makes it just or proper that he should have more than one-third of the income for his support; and the condition of his domestic affairs cannot be overlooked. Here then are the exceptional circumstances which call for the interference of a court of equity to control the discretion of the trustee in the application of the trust fund.

As to the defendant Anna S. and her claims, many of the observations already made apply. While she lived with the trustee and was maintained by him, making no complaint, so far as appears, of the amount of money expended for her support and maintenance, she certainly cannot complain that the trust as to her was not performed. There was no certain sum or proportion of the income to which she was entitled. After she separated from her husband he supported her by money either voluntarily or involuntarily paid, and for any period prior to the commencement of this action, we do not see any foundation for any claim by her for any more of the trust fund or income than was applied for her support and maintenance.

But from the time of the commencement of the action she should be entitled to have one-third of the income paid to her. So far the discretion of the trustee, on account of the relations existing between her and him, can properly be controlled.



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But from the sum so to be paid should be deducted the amount of alimony, \$1,000 per year, which the trustee has been ordered by the judgment in the action for a separation to pay to her. It was clearly shown that in fixing the amount of the alimony the court assumed that the whole of the income of the trust property belonged to the husband, and based the amount of alimony upon that assumption. It would be very unjust now, also, to compel him to pay her one-third of the income in addition. If he supported his wife as a member of his family, he would discharge his trust, and so far as he supports her elsewhere, or contributes to her support elsewhere, his trust should be considered discharged. If he pays for her support the full one-third of the income, she should have no claim for more in this action. If he pays less, her claim should be only for the balance. If the amount of alimony, considering the amount of the trust income and of her husband's property, is not sufficient, she can apply to the Supreme Court, on the basis of the separation judgment, for an increase of the same. We can, at this time, perceive no other disposition of the wife's case, as it is now presented to us, which would not work injustice to the husband.

The result, therefore, is that the judgments of the Special and General Terms should be reversed, and the case remitted to the Special Term to the end that there the amount of the net income of the one-half of the trust property, since the commencement of this action, may be ascertained, with a proper allowance of commissions and expenses to the defendant Robert, and that the plaintiff may have judgment for one-third of such net income after such allowance, so far as the same has accrued, and that the defendant Anna S. may have a similar judgment for the balance, if any, after deducting the amount of \$1,000 per year allowed to her for alimony, neither party to recover costs of appeal to this court.

All concur.

Judgment accordingly. .

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## Statement of case.

MILES R. RIGGS, as Administrator, etc., Appellant, v. THE  
AMERICAN TRACT SOCIETY, Respondent.

Plaintiff's complaint alleged in substance that R., his intestate, being at the time of unsound mind, transferred to defendant various sums of money under an agreement, in writing, by which defendant agreed to pay to R. the interest on said money during his life, and after his death interest on the whole or a part thereof to his executor or administrator for the benefit of his widow, or directly to his widow and his sister for their benefit during their lives; that interest was paid by defendant up to the death of R., but not since; that the sister of R. died shortly after his death; that plaintiff, after his appointment as administrator, obtained from the widow her written consent that he might surrender the written agreement, which he offered to do, and demanded a return of the moneys, which defendant refused. On demurrer to the complaint, *held*, that it stated a good cause of action; that the allegation as to unsoundness of mind was one of fact, and the contract was one that could be rescinded. Where a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic and without knowledge of his incapacity, and that it has been so far performed that said party cannot be placed in *statu quo*, these facts must be alleged and proved.

*Riggs v. American Tract Society* (19 Hun, 481), reversed.

(Argued February 4, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made January 6, 1880, which reversed a judgment of Special Term, entered upon an order overruling a demurrer to the complaint herein. (Reported below, 19 Hun, 481.)

The complaint alleged in substance that the plaintiff's intestate, Ira Riggs, was for upward of fifteen years next preceding his death of unsound mind, and for that cause legally incapable of making the dispositions of his property to the defendant which are thereafter set forth; that shortly prior to his death he, in form, transferred to the defendant several sums of money, amounting in all to the sum of \$4,000, which the defendant received; that said moneys were so transferred and received under an arrangement by which the intestate,

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being of unsound mind as aforesaid, agreed to give, and did give, said moneys to defendant, and defendant agreed to give, and did give, to the intestate certain assurances in writing, obligating the defendant to pay the interest on said money, every six or every three months, to the intestate during his life, and thereafter — on the whole or a part of said money — to either the executor or administrator of the intestate, for the benefit of his wife, being his widow, or directly to his wife and to his sister, Marilda, for their benefit during their lives respectively. The complaint also alleged that the interest on said money was paid by the defendant to the intestate during his life; that his sister, Marilda, died shortly after his death, without having received any of such interest, and that none of said interest has been paid to the plaintiff; that soon after the plaintiff was appointed administrator he found said written assurances among the papers of the intestate, and thereupon he obtained from the widow of the intestate her written consent that he might surrender said assurances to the defendant, and he afterward, and before the commencement of this action, offered to surrender to the defendant the said consent of the widow, acknowledged by her, together with the said assurances and all claims of the plaintiff or of the widow based upon them, and demanded a return of said sums of money; all of which the defendant refused. The relief demanded is a judgment for said \$4,000, with interest from the time of said demand.

The demurrer was upon the grounds: 1. That there is a defect of parties defendant, in the omission of the widow of the intestate, and also in the omission of the personal representatives of the next of kin of his said sister, deceased; and 2. That the complaint does not state facts sufficient to constitute a cause of action.

*H. L. Comstock* for appellant. The words "unsound mind" as used in the complaint are of equivalent import with the phrase *non compos mentis*. (*Ex parte Brunsley*, 3 Atk. 167; *Stewart's Executor v. Lispinard*, 26 Wend. 297; *Blanchard v. Nestle*, 3 Den. 41; 1 R. S. 719, § 10; 2 id. 54, 56,

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57, § 1; 2 Abb. Forms, 41; *Dows v. Hotchkiss*, 10 Leg. Obs. 281; *Seaver v. Phelps*, 11 Pick. 304.) The gifts, or transfers of money, made by the plaintiff's intestate to the defendant, as stated in the complaint, were void, and not merely voidable. (*Van Deusen v. Sweet*, 51 N. Y. 378; *Farley v. Parker*, 6 Or. 105; 25 Am. Rep. 514; *Dexter v. Hall*, 15 Wall. 9; *Thompson v. Leach*, Carth. 435; *Estate of Sarah De Silver*, 5 Rawle, 111; *Yates v. Boen*, 2 Str. 1104; *Beverly's Case*, 4 Rep. 123; *Thompson v. Leach*, Comb. 468; *S. C.*, 3 Salk. 300.) If it should be assumed that the several transfers of money by the intestate to the defendant, as stated in the complaint, were voidable, and not void, still plaintiff, as administrator, has a right to avoid the several transfers and recover back the money for the benefit of the next of kin and creditors of the intestate. (*Gibson v. Soper*, 6 Gray, 279; *Nichol v. Thomas*, 53 Ind. 42; *Hovey v. Hobson*, 53 Me. 451; *Seaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 15 Johns. 503; *Henry v. Fine*, 23 Ark. 417; *Van Dusen v. Sweet*, 51 N. Y. 384; *Matthiesen and W. R. Co. v. McMahon*, 38 N. J. L. 537.) The transactions between the intestate and the defendant were substantially gifts, and the agreement of the defendant to pay interest on the money during the life-time of the intestate, his widow and sister, does not change the character of the transactions as gifts. (*Doty v. Wilson*, 47 N. Y. 580; *Hills v. Hills*, 8 M. & W. 404; *Blount v. Barrow*, 4 Bros. C. C. 72; *Moulton v. Camroux*, 2 Exch. 487.) It was not necessary that the plaintiff should put the defendant *in statu quo* in fact, but only that he should be able to do so and should make the offer to do it. (*Gibson v. Soper*, 6 Gray, 279; *Henry v. Fine*, 23 Ark. 417; *Nichol v. Thomas*, 53 Ind. 42.)

*Howard Payson Wilds* for respondent. The administrator cannot maintain this action, even if the intestate's transfer of money to defendant were void. (2 R. S. 82, § 6; *Jackson v. King*, 4 Cow. 207, 217; *Ordranax*, Judicial Aspect of Insanity; *Person v. Warren*, 14 Barb. 494; *Osterhout v. Shoemaker*, 3 Den. 37, note.) This action is one for money had

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and received, and the plaintiff fails to satisfy the well-settled rule that he must show an equitable right in good conscience and natural justice. (*Doty v. Willson*, 47 N. Y. 584; *Hills v. Hills*, 8 M. & W. 404; *Bloubet v. Burrow*, 4 Brown Ch. C. 72; *Allen v. Berryhill*, 27 Iowa, 534; *S. C.*, 1 Am. R. 309; *Allis v. Billings*, 6 Metc. 415; *Carrier v. Sears*, 4 Allen, 336; *Howe v. Howe*, 99 Mass. 98; *Blanchard's Gunstock Factory v. Warner*, 1 Blatchf. 258, 271, 277; *Dorsey Harvester Rake Co. v. Marsh*, 6 Fish. Pat. Cas. 393; *Ould v. Washington Hospital*, 95 U. S. 303; 2 Perry on Trusts, §§ 701, 705; *Buel v. Boughton*, 2 Den. 91; 1 Chit. Pl. 368; *Peters v. Gooch*, 4 Blackf. [Ind.] 515; *Stanton v. Miller*, 1 Sup. Ct. [T. & C.] 23; 58 N. Y. 192; *Matter of Cornwall*, 9 Blatchf. 114; *Spalding v. Hallenbeck*, 30 Barb. 292; 35 N. Y. 204; 39 Barb. 79.) A person who is merely "of unsound mind" is not necessarily, or even presumptively, incapable of making such a disposition of his property. (Browne's Med. Juris. of Insanity, § 57; *Searle v. Galbraith*, 73 Ill. 272; *Kendall v. May*, 10 Allen [Mass.], 59, 64; *Hall v. Unger*, 2 Abb. [U. S. Circ. Ct.] 512; *Dennett v. Dennett*, 44 N. H. 531.) The character of the unsoundness of mind and the connection between the alleged unsoundness and the kind of transaction are essential matters necessary to be pleaded as matter of fact. (*Oakes Case*, 8 Law R. 122; *Henchman v. Riche*, Brightly, 143; Article on Confinement of Insane, 3 Am. Law Rev. 193, Jan. 1869; *Brushe's Case*, 3 Abb. [N. C.] 325; *Ayert's Case*, id. 218; *Spittle v. Walton*, L. R., 11 Eq. 420; *Kendall v. May*, 10 Allen [Mass.], 59; *Cartwright v. Cartwright*, 1 Phill. 90; *Matter of Barker*, 2 Johns. Ch. 237; *Breed v. Pratt*, 18 Pick. 115; *Lewis v. Jones*, 50 Barb. 645; *Matter of Gilbert*, 3 Abb. [N. C.] 222; *Delafield v. Parish*, 25 N. Y. 9, 27, 29; *Stewart v. Lispenard*, 26 Wend. 225; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *Jackson v. King*, 4 Cow. 207; *Person v. Warren*, 14 Barb. 495; Bishop on Mar. and Div., § 129; Browne's Med. Juris. of Insan., § 155, last paragraph; *Anon. Z. v. X.*, 2 Key & J. 441; Story on Partn., §§ 292-297; *People v. Montgomery*, 13 Abb. Pr. [N. S.] 207; *People v.*

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*Flanigan*, 52 N. Y. 467; *People ex rel. Norton v. N. Y. Hospital*, 3 Abb. [N. C.] 229, note; *Holcomb v. Holcomb*, 28 Conn. 177; *Regina v. Hill*, 5 Eng. L. & Eq. 547; *S. C.*, 5 Cox Cr. Cas. 2592; Den. Cr. Cas. 254.) A mere allegation in a complaint that a party was "of unsound mind," is wholly insufficient to show any one particular incapacity. (*Matter of Barker*, 2 Johns. Ch. 237; 3 Barb. Ch. Pr. 659; 3 Tiffany & S. 420; *Nix*, Forms, 192; *People ex rel. Purdy v. Highway Comm.*, 54 N. Y. 276; *City of Buffalo v. Holloway*, 7 id. 493; *Butler v. Viele*, 44 Barb. 166; *Simmons v. Fairchild*, 42 id. 404; *The Commercial Bk. of Rochester v. The City of Rochester*, 41 Barb. 341, 342; *Hofheimer v. Campbell*, 59 N. Y. 274; *Deshon v. Merchants' Bank*, 18 Bosw. 461.) The contracts of an insane person in the absence of fraud, etc., are not void, but at most only voidable. (*Ingraham v. Baldwin*, 9 N. Y. 45; 12 Barb. 9; *Loomis v. Spencer*, 2 Paige, 158; *Matter of Exp. Beckwith*, 3 Hun, 443; *Fitzhugh v. Wilcox*, 12 Barb. 237; *Person v. Warren*, 14 id. 488; *Canfield v. Fairbanks*, 63 id. 461; *Beavan v. McDonnell*, 9 Exch. 309; *Beals v. See*, 10 Barr. 60; *Allis v. Billings*, 6 Metc. 415; *Carrier v. Sears*, 4 Allen, 336; *How v. How*, 99 Mass. 98; *Allen v. Berryhill*, 27 Iowa, 534; *S. C.*, 1 Am. Rep. 309; *Hunt v. Weir*, 4 Dana, 348; *Eaton v. Eaton*, 8 Vroom [N. J.], 108; *S. C.*, 18 Am. Rep.; *Caar v. Holiday*, 5 Ired. Eq. 167; 1 Story on Contr., § 82 [5th ed.]; § 42 [4th ed.]; 1 Addison on Contr. 140 [Bank's ed.]; § 192, p. 192 [Morgan's ed.]) Equity will not interfere to avoid an executed contract, where it was made in good faith, without knowledge of the incapacity, and the lunatic has had the benefit of it. (*Loomis v. Spencer*, 2 Paige, 158; *Price v. Barrington*, 7 Eng. L. & Eq. 254; *S. C.*, 15 Jur. 999; 3 Mac. & G. 486; *Sprague v. Duel*, Clarke Ch. 90; 11 Paige, 480; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Canfield v. Fairbanks*, 63 Barb. 461; *Neil v. Morley*, 9 Ves. 478; *Loomis v. Spencer*, 2 Paige, 153; *Person v. Warren*, 14 Barb. 488.) Contracts with an insane person, wholly executed, or so far executed that the parties cannot be placed in *statu quo*, cannot be avoided either at law or in

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equity upon the mere ground of insanity. Fraud or unconscionable advantage, or, at least, knowledge of the insanity, must be alleged and shown. (1 Story's Eq. Jur., § 227; *Cruise v. Christopher*, 5 Dana, 182, note; *Moulton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *S. C.*, 18 Law-J. Exch. 356, 1848; *Elliott v. Ince*, 7 DeG. M. & G. 475-487; *State Bk. v. McCoy*, 19 Smith, [Penn.] 204; *Nace v. Boyer*, 6 Casey, 99; 2 Kent's Com. [12th ed.] 451; *Matter of Beckwith*, 3 Hun, 445; *Lincoln v. Buckmaster*, 32 Vt. 652; *Matter of Rich'd Beckwith*, 2 Hun, 443; *Person v. Warren*, 14 Barb. 488; *Osterhout v. Shoemaker*, 3 Den. 37, note; *Loomis v. Spencer*, 2 Paige, 153; *Musselman v. Cravens*, 47 Ind. 1; *Young v. Stevens*, 48 N. H. 133; Wharton & Stille, Med. Juris., § 8 [ed. 1873]; *Behrens v. McKenzie*, 23 Iowa, 343; *Beals v. Lee*, 10 Barr. 56; *Lancaster Co. National Bk. v. Moore*, 78 Penn. St. 412; *Matter of Gilbert*, 3 Abb. [N. C.] 222; *May v. May*, 109 Mass. 254.) It is incumbent on the party who seeks to avoid a transaction by an insane person to allege and prove that the other party had knowledge of the insanity. (*Young v. Stevens*, 48 N. H. 133; *Harrison v. Richardson*, 1 Moody & Rob. 504; *Ingraham v. Baldwin*, 9 N. Y. 45; *Behrens v. McKenzie*, 23 Iowa, 343; 2 Chitty's Pl. 436 [ed. of 1876]; Bullen & Leak's Forms, 354; 2 Abb. Forms, 41; *Arnold's Case*, 16 How. St. Tr. 764.)

DANFORTH, J. In this case we can look to the complaint only for the facts on which the questions presented by the demurrer turn; and although both grounds stated by the defendant have been fully argued, we see no reason to differ from the conclusion reached by the General Term, that the complaint contains a cause of action.

In substance it is that Ira Riggs in his life-time was of unsound mind, and while in that condition transferred to the defendant by gift or contract several sums of money which it still holds, and refuses to return. Now upon that concession the learned counsel for the defendant has failed to raise a doubt that Ira Riggs if living would have a right to reclaim the money

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or, he being dead, that his representative may do so. Indeed the contrary can be maintained only by overthrowing the elementary principle of the common law, which renders a gift or contract invalid unless the mind goes with the act, and this, whether the actor is without mind, or of unsound mind, or of a mind not possessed of itself, as under duress. Of course if the plaintiff stood only on the fact of transfer, sanity at the time alleged would be presumed, and the plaintiff have the burden of showing the contrary. Now it is otherwise. The conceded fact takes the place of proof, and renders it unnecessary. It is, however, seriously argued that some further allegation is necessary, "that a person who is merely of unsound mind is not necessarily or even presumptively incapable of making such a disposition of his property." But in no other words could the pleader so well state the exact point to which the jury or the trial court must come before a decision is rendered in favor of the plaintiff. In *Ex parte Barnsley* (3 Atk. 168), to an inquisition "whether B. is a lunatic," the return was that "from weakness of mind he is incapable of governing himself, and his lands and tenements;" and upon motion to quash there was much debate as to its effect, whether sufficient or not. It was held bad, partly because the words in sense and meaning were not equivalent to the answer sought by the inquisition, and partly because the return was not easily traversable. The chancellor, saying after reference to investigation of the records that the proper return was "*lunaticus* or *non compos mentis*," or "*insana mentis*;" or since the proceedings have been in English, "of unsound mind," which he says "amounts to the same thing." Thus the fact to be found might be expressed in either of these ways. They all import a total deprivation of sense, and he adds, "courts of law understand what is meant by *non compos* or *insane*, as they are words of a determinate signification," and, as before stated, either expression is represented in English by the words used in this complaint. The allegation is, that Ira Riggs was of "unsound mind," not as a conclusion of law, but a fact founded upon other facts, some or all of which it may be necessary to prove, but only when issue is taken upon the one



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alleged. In the same sense the words are used in our statutes, as where in proceedings to acquire land in certain cases, papers are to be served upon one who is "an idiot or of unsound mind." and this, whether before or after inquisition found or guardian appointed (Laws of 1850, § 14, subd. 4, 6); or the chancellor is given the care and custody "of persons of unsound mind;" (2 R. S., tit. 2, chap. 5, p. 2, § 1.) So "persons of unsound mind" are incapable of holding or conveying land (1 R. S., 719, § 10), or submitting controversies to arbitrators, or devising real estate (2 R. S., 56, 57, § 1), or bequeathing personal estate (2 R. S., 60, § 21); and in the same way in other statutes. Therefore, both at common law, in the practice of the courts, and the language of the legislature, these words signify and describe persons of a certain condition which, whenever called in question, is to be ascertained like any other fact named or stated in pleading, the same as that a person is "an infant" or "a married woman." It is said, however, and I think justly, by the learned counsel for the defendant, that when made in good faith, for the benefit of the lunatic, without notice of incapacity, and so far performed that if rescinded the party executing cannot be placed *in statu quo*, the contract shall stand. *Mutual Life Ins. Co. v. Hunt*, 79 N. Y., 541, cited by him, and many other cases, some of which are therein named, are to that effect.

But no one of these facts is to be found within the corners of the record on which this appeal stands. So far from it, the transaction was to the prejudice of Ira Riggs. In the ordinary affairs of life, the borrower pays interest and at the end of the term repays the principal. It is part of the debt. Here the defendant was to pay the interest for a period of time and thereafter retain both principal and interest as its own; in no event repay the principal. Riggs was to receive nothing which was not already his, nor was the defendant to part with any thing which belonged to it. A sane man might so contract if he saw fit, for he could dispose of his property where, when and how he pleased; but the defendant claims under one incapable of contracting. Therefore, if the facts above alluded to

as those upon which a title acquired from such a source can stand, they must be established. They cannot be presumed to lie in the knowledge of the plaintiff, or even to exist; if they do, they must be alleged and proved by the defendant.

As to the other ground of demurrer, we think, as the case now appears, the controversy may be determined without the presence of other parties. The money in question was taken from the estate of the intestate, and if restored will again form part of it for distribution. If invalid at all, the transaction with the defendant was wholly so, and neither the widow nor the sister of the intestate could acquire rights under it; but if this was all, it might still be necessary to bring them before the court in order that upon such question they could be heard. But the question now is with the defendant; and by its concession the plaintiff is both able and willing to cancel and return to it the assurance or promise which it gave to the intestate on receiving his money, and also to surrender to it all claims which the beneficiaries or either of them might have under such promise or assurance. This is enough to release the defendant from all liability, and will operate as a complete discharge. There are many questions discussed by the learned counsel for the defendant which may be of great interest in some other stage of the case. They need not be considered now, for however answered they would not affect the conclusion which necessarily follows from the views above expressed.

The judgment appealed from should be reversed and judgment of Special Term affirmed, with leave, however, to the defendant, within twenty days hereafter, to withdraw its demurrer and answer over upon payment of costs in the Supreme Court and in the Court of Appeals.

All concur, except RAPALLO, J., absent.

Judgment accordingly.

JAMES ORMISTON, Respondent, v. HORATIO G. OLCOTT, Executor, etc., Appellant.

*It seems* that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments.

This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception.

The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security.

Where, therefore, the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guaranteed by the widow who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, *held*, that it was the right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing.

The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees.

Also, *held*, that while it was the duty of the surviving executor to foreclose the mortgage in case of non-payment, he was entitled to exercise the reasonable discretion of an ordinarily prudent man as to the time and occasion.

*Ormiston v. Olcott* (22 Hun, 270), reversed.

(Argued February 7, 1881; decided March 1, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 24, 1880, reversing an order of the surrogate of the county of Otsego, which denied the petition of the plaintiff that defend-

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ant be held personally liable for unpaid interest on securities taken by him as executor and trustee. (Reported below, 22 Hun, 270.)

The facts as conceded and found are substantially as follows:

Robert Ormiston, late of the town of Springfield, in the county of Otsego, died, leaving a last will and testament, which was admitted to probate by and before the surrogate of said county of Otsego, wherein defendant, Horatio J. Olcott, Oliver A. Morse and William M. Oliver were named as executors thereof and trustees of the estate, which was given to them in trust, to pay the rents, issues and profits to James Ormiston, the petitioner, and Agnes Ormiston, his wife, during their lives and the life of the survivor of them, and, upon their deaths, to pay the principal to the grandchildren of the testator. Letters testamentary were issued to said persons, and they took upon themselves the execution of the trust on or about the 4th day of December, 1842. William M. Oliver died on or about the year 1863. Oliver A. Morse died on or about the 19th of April, 1870, leaving said Olcott the only survivor of said trustees. On or about the 23d day of February, 1876, an accounting was had by said Olcott before the surrogate as such executor and trustee, and such proceedings were had that there was found in his hands \$11,071.09. Olcott did not pay the interest or income to the *cestui que trust* for the year ending the 1st day of April, 1879, except the sum of \$200. Agnes Ormiston, wife of the petitioner, died about November 7, 1876, and the petitioner is entitled to the whole of the income. Oliver A. Morse during his life-time had and received all the assets and proceeds of the estate, and had the entire charge of the same. After the death of Morse, in April, 1870, Olcott made an examination of the matters of said trust in the hands of Morse, and found that much of the assets had been invested and lost or converted by said Morse and mingled with his own funds. He thereupon, for the purpose of restoring said fund, and, as he swears in his answer, and as the surrogate found, in good faith and "in the full belief that it was the best possible arrange-

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ment to secure the fund," took from the executors of Morse an assignment of a bond and mortgage upon unincumbered real estate situate in the city of Toledo, in the State of Ohio, for \$12,500, which mortgaged premises at that time were of a market value greatly exceeding the amount of the mortgage, as estimated by competent judges, and were considered to be first-class security for the amount of said mortgage. He also took other and additional securities as collateral, and, to further protect said trust and secure its payment, he took from Anna Morse, the widow and sole legatee of Oliver A. Morse, and who was then good and responsible, a guaranty of the payment of said mortgage at maturity. After taking said mortgage, Olcott, on notice to all parties interested, duly rendered an account to the surrogate, of the said trust fund, whereon it appeared that the same was invested in the aforesaid mortgage, secured as aforesaid. Said account was accepted by the surrogate, and was not objected to by any of the parties interested. The petitioner was present and represented by counsel at the time of such accounting.

Olcott alleged and the surrogate found that the mortgagors in said mortgage have become insolvent, and by reason thereof the said Olcott has not been able to collect the interest thereon, and that he believed it would not be good policy, or for the interest of the said fund, or the parties interested therein, to foreclose said mortgage in the present depressed state of values of real estate, and was advised that if he should do so it would result in loss. That, by reason of his not having received any income or interest from said fund, he has not been able to pay over any interest or income due April 1, 1879.

The surrogate, upon the foregoing facts, made an order or decree denying the prayer of the petitioner, and adjudging that said Olcott is not guilty of such wrong-doing as renders him personally liable for any loss which results from his inability to collect the said mortgage or the interest thereof.

The General Term reversed this order or decree of the surrogate, and ordered that the prayer of the petitioner be granted.

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*Samuel A. Bowen* for appellant. This is not a case of the investment of the trust moneys by the trustee. (2 Story's Eq. Jur., §§ 1281-1283; 1 Perry on Trusts, §§ 416, 417; *Kip's Adm'rs v. Dunston*, 4 Johns. 23.) The fund had lost its identity as a trust fund. It could only be regarded as a claim against the Morse estate and subject to all the contingencies of other claims. (*Barney v. Saunders*, 16 How. [U. S.] 535; *Duncomb v. Duncomb*, 1 Johns. Ch. 508; *Shieffelin v. Stewart*, id. 620; *Garniss v. Gardner*, 1 Edw. Ch. 128; *Cogswell v. Cogswell*, 2 id. 231.) The measure of defendant's liability is the same as though the testator had died in 1870, leaving his property in the same shape as Morse left his estate, and by his will directing that his executor keep invested \$11,000, more or less, out of his estate and pay over the interest, etc., and the executor had set aside the mortgage in question as such investment. (*Thompson v. Brown*, 4 Johns. Ch. 619, 629.) With a testamentary trustee the discretion is vested in the trustee by the testator, and if this discretion is exercised in good faith, and without fraud or collusion, the court cannot review or control his discretion. (2 Perry on Trusts, § 511; *Hawley v. James*, 5 Paige, 485.) So long as he keeps within such discretion the court has nothing to do with him. (*King v. Talbot*, 40 N. Y. 76, 85, 86; *Harvard College v. Amory*, 9 Pick. 446, 460, 461; *Lovell v. Minot*, 20 id. 116; *Ackerman v. Emott*, 4 Barb. 626, 645, 646.) The acquiescence of a *cestui que trust* in a breach of the trust by the trustee will bar a recovery therefor. (*Sherman v. Parish*, 53 N. Y. 483, 492; Perry on Trusts, § 467; *Brice v. Stokes*, 11 Ves. 319, 325, 333.)

*H. Sturges* for respondent. A trustee must ascertain what investment his co-trustee proposes to make, what security he proposes to take. (Perry on Trusts, § 417; *Clark v. Clark*, 8 Paige, 152; *Johnson v. Corbett*, 11 id. 265; *Bates v. Underhill*, 3 Redf. 365.) A trustee can only protect himself by making investments recognized by the law and the rules and practice of the court. (Perry on Trusts, § 453; *Stiles v. Bee-*

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*man*, 1 Lans. 90; *Stuart v. Stuart*, 3 Beav. Ch. 430; Lewin on Law of Trusts [6th ed.], 290; *Ex parte Copeland*, Rice's Eq. [S. C.] 69; *Matter of Rush's Estate*, 12 Penn. 378; *King v. Talbot*, 50 Barb. 453-483; Hill. on Trustees, 270; *Ackerman v. Emmott*, 4 Barb. 626.)

FINCH, J. Our own study of this case, and the very careful researches of the counsel by whom it was argued have alike failed to discover any judicial decision, or any legislative enactment, which directly and in terms declares as the law of this State that an executor or testamentary trustee may not invest the funds in his custody, under any circumstances, in good mortgages upon real estate situate outside of the State. And yet the general drift of authority and considerations relating to the safety of trust funds seem to require that such should be regarded as the general rule, and that investments beyond the jurisdiction of the court should not be sustained unless in very rare and exceptional cases, and under very unusual and peculiar circumstances. The rule should not be made arbitrary and inflexible, and so rigid as to admit of no possible exceptions, for it is merely an outgrowth or consequence of the broader and admitted proposition that the duty of a trustee in making investments is to employ such diligence and such prudence as, in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. (*King v. Talbot*, 40 N. Y. 76.) While, therefore, we are not disposed to say that an investment by a trustee in another State can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity, or a very pressing emergency. The cases in our courts have quite clearly recognized the rule that an executor must invest in government or real estate securities (*Ackerman v. Emmott*, 4 Barb. 626); but apparently no occasion has arisen until the

present to determine the effect of such an investment made beyond our jurisdiction. It would often be unjust to beneficiaries to compel them to accept such investments, and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantages of distance, and before different and unfamiliar tribunals. We do not hesitate, therefore, to recognize and declare as the general rule that the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment. But this rule relates only to voluntary investments by the trustee, having the fund in his hands and full opportunity and freedom of choice, and does not govern a case where, by the act of the testator, a foreign investment has been made; nor a case where, without the fault of the executor, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. The question at bottom is in every instance the prudence and diligence of the executor, and that always must be measured, and may be modified by surrounding circumstances. In the present case, the General Term have treated the Ohio mortgage taken by the executor as a voluntary investment of trust funds beyond the jurisdiction. We do not concur with that view of the facts. The assets of the estate had all passed into the possession of the executor, Morse, and the defendant had taken no part in their possession or management. Upon the death of Morse, the defendant became sole surviving executor, and, as in duty bound, sought to reclaim the remaining assets. He found none remaining as such, and a personal liability substituted by the act of Morse and not by his own. He found that his associate executor had mixed such assets with his own property, partially converted them to his personal use, and in part lost them by unsafe investments. We do not know as a fact that the estate of Morse was insolvent, nor can we be certain that it was solvent. One thing, however, is quite apparent.



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The trust funds had been practically absorbed in the estate of Morse, and had been changed into a debt due from that estate. The duty which devolved upon the surviving executor and which he proceeded to perform was one, not of investment, but of collection. He stood in the presence of an emergency which required him to do, not so much what he preferred, as what he could. He swears in his answer that what he did was done in good faith and "in the full belief that it was the best possible arrangement to secure the fund from the estate of Morse." He took from that estate a bond and a mortgage on real estate in Toledo, which was assigned to him by Morse's representatives, and guaranteed by the widow who was sole legatee, and at that time solvent, and also further collaterals for greater safety. The surrogate in his decree finds these facts to be true, and they stand wholly uncontradicted. The situation, therefore, is plain. The estate of Morse could not raise and pay the ready money. The surviving executor was shut up between two alternatives. He must either present his claim, await the slow process of administration, take all the chances of the solvency of the estate, run every risk of the honesty and prudence of its administration and of possible sacrifices, and trust to the slight watch possible over affairs transacted by others, or he must accept the securities offered, at the time perfectly good, and having no fault except that in part they were beyond the jurisdiction. If the estate of Morse was solvent the guaranty of the sole legatee held its entire surplus, and if insolvent a good security for the full amount was better than a partial and uncertain dividend. We have no difficulty in concluding that it was defendant's duty to accept the securities offered, and that his omission to do so would have been imprudent and unwise. Nor do we hesitate to say that his action does not come under the rule which forbids a foreign investment. To hold that it does would establish a perilous precedent. It might hamper the collection of debts by trustees and executors due in foreign States, and drive them to refuse ample security and thereby encounter grave risk of loss. We are of opinion, therefore,

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that the defendant violated no rule of prudence in taking the security objected to, and should not be made personally liable for so doing.

Two other grounds were presented on which, it is alleged, such liability can be sustained. It is admitted that up to the death of Morse, the defendant, although co-executor, took no part in the management of the trust. It is claimed that this was negligence which rendered him liable for the misconduct of Morse. It is not disputed that the rule applicable to executors, as such, is that each is liable only for his own acts, and one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein. (*Sutherland v. Brush*, 7 Johns. Ch. 22; *Monell v. Monell*, 5 id. 283; *Manahan v. Gibbons*, 19 Johns. 427.) It is claimed, however, that the rule is more stringent where executors are also trustees, and the case of *Bates v. Underhill* (3 Redf. 365) is brought to our attention. The decision in that case is rested wholly on the English rule, which is not so rigorously enforced in this country. (Hill. on Trustees, 309, note 1; Story's Eq. Jur., § 1280.) The authorities in this State do not justify the distinction sought to be made. (*Banks v. Wilkes*, 3 Sandf. Ch. 99; *Kip v. Deniston*, 4 Johns. 23; *Kirby v. Turner*, Hopk. Ch. 330; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 130.) There would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent.

It is further urged that the executor was negligent in continuing the investment, and in not collecting it from the debtors, and the decree of the surrogate at the close of the executor's accounting is said to have been disobeyed. Assuming that the executor had the right to take the mortgage, he certainly could not have collected it until it was due. It does not appear when that period arrived. It does appear, however, that in December, 1875, the executor rendered an account before the surrogate in which the investment in question was

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plainly set forth and described, and to which neither the surrogate nor the plaintiff made any objection. The decree which directed the executor to "retain" and invest the fund merely followed the direction of the will. It is probable that the mortgage has become due, and at all events there is interest unpaid. The executor explains that he has not foreclosed on account of the depressed values of real estate. His duty is to foreclose, but he must be allowed the reasonable discretion of an ordinarily prudent man in the choice of a time and occasion. We cannot say that he has been so negligent in this respect, with the little knowledge furnished us as to the facts, as to have become liable for the amount of the trust fund. The case furnishes no accurate statements from which we can measure the length of the executor's delay since a foreclosure was possible, and gives no proofs tending to discredit the truth of his explanation or throw doubt upon the soundness of his judgment. We cannot as yet know that an ultimate loss will, in fact, result, and would not be justified in assuming it to be certain, and, on the present state of facts, charging the executor with the whole fund. The duty of an executor is difficult and delicate, and somewhat perilous even under favorable circumstances. And while no rule of proper responsibility should be relaxed, yet where he acts honestly and in good faith, and with reasonable prudence and discretion, he should not be held liable for unfortunate results which he could not be expected to foresee and was powerless to prevent.

The order of the General Term should be reversed and that of the surrogate affirmed with costs.

All concur, except FOLGER, Ch. J., dissenting, and RAPALLO, J., absent; ANDREWS, J., concurring in result.

Ordered accordingly.

JOHN FAGAN, Respondent v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK et al., Appellants.

Under the New York city charter of 1878 (§ 71, chap. 385, Laws of 1873), the commissioner of public works being charged with the care of the public buildings, has power to appoint janitors of the buildings in which the district civil courts are held; the common council cannot appoint, nor can it delegate to the justices of said court the power to appoint a janitor to take charge of any of the public buildings.

Plaintiff was appointed by said commissioner janitor of the building in which the sixth district civil court in said city held its sessions. Defendant C. was appointed janitor by the justice of said court under a resolution of the common council authorizing the justices of said courts to appoint janitors for their courts. The board of estimate and apportionment made an appropriation to pay the salary of one janitor of said court, with the condition, however, that no portion should be paid by the comptroller until the question was judicially determined, in whom, by law, the appointment of janitors was placed; and that "the city is not to be burdened with the expense of two sets of janitors." *Held*, that the appointment of plaintiff was valid; that this was a proper case for impleading C. as an adverse claimant, with the city; that C. had no lawful appointment; that no distinction could be recognized between a janitor of the court and a janitor of the building in which the court is held, and but one janitor could legally serve; and that, therefore, plaintiff alone was entitled to payment out of the appropriation.

(Argued February 7, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made November 9, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are set forth sufficiently in the opinion.

*D. J. Dean* for the corporation appellant. A cause of action existed against Cummysky and a judgment can be given herein in relation to his claim to the salary. (*Kennedy v. The Mayor*, 79 N. Y. 361.) No judgment can be rendered for either of the parties claiming janitor's salary herein, unless the

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court at the same time adjudges that such claim is exclusive, and that the other party has no title to a salary as janitor of the court or court-house. (*McCullough v. Mayor*, 51 How. 486.) Court attendants are a class separate from janitors. (*Dunphy v. Mayor*, 8 Hun, 476; *Bergen v. The Mayor*, 5 id. 244.) The defendant Cummisky has estopped himself from contending that he is not a proper and necessary party to this action, by the position which he assumed, when the controversy was before this court on the former occasion, *sub nomine*. (*Kennedy v. The Mayor*, 77 N. Y. 50; *Risley v. Smith*, 64 id. 576; *Bowen v. Bowen*, 30 id. 519; *Gaylord v. Van Loan*, 15 Wend. 308; *Miller v. Watson*, 4 id. 267; *Brookman v. Metcalf*, 4 Robt. 568.)

*Elliot Sanford* for appellant Cummisky. The complaint as amended did not contain any cause of action against Cummisky. (55 How. 193; 59 id. 92; *Palmer v. Davis*, 28 N. Y. 242; *Mont. Bk. v. Albany Bk.*, 7 id. 459; *Tooker v. Arnoux*, 76 id. 397; *Richtmyer v. Richtmyer*, 50 Barb. 55; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Allen v. Fosgate*, 11 How. 218; 37 N. Y. Super. Ct. 334; *People v. Ingersoll*, 67 Barb. 484; affirmed, 58 N. Y. 1.) The action of the board of apportionment in affixing certain conditions to the appropriation was *ultra vires* and invalid. (*Whitmore v. The Mayor*, 67 N. Y. 21; *Morse v. Williamson*, 35 Barb. 472; *People v. Lawrence*, 6 Hill, 244; *Sherwood v. Reed*, 7 id. 431; *Bennett v. Bayle*, 40 Barb. 557; *Joslyn v. Dow*, 19 Hun, 494; *People v. Ransom*, 56 Barb. 513, 519; *Merritt v. Portchester*, 71 N. Y. 309; *Bergen v. The Mayor*, 5 Hun, 244; *Sullivan v. The Mayor*, 45 How. 152.) The portion of the answer of the defendant Cummisky offered in evidence was improperly received. (*Perego v. Purdy*, 1 Hilton, 269; *Forrest v. Forrest*, 6 Duer, 102, 129; *Stuart v. Kissam*, 2 Barb. 493; *Dorlon v. Douglass*, 6 id. 451; *Bearss v. Copley*, 10 N. Y. 93; *Rouse v. Whited*, 25 id. 170, 175; Phillips on Evidence [4th Am. ed.], 410; *Gildersleeve v. Landon*, 73 N. Y. 609; *Sullivan v. The Mayor*, 52 id. 652;

47 How. 449.) The refusal of the court to dismiss the complaint against Cummisky was error, plaintiff having failed to prove any demand upon the comptroller thirty days before the commencement of the action. (*Know v. The Mayor*, 55 Barb. 416; *Russell v. The Mayor*, 1 Daly, 263.) The commissioner of public works is only an executive officer under the charter of 1873, section 19, and has no power to employ janitors at an annual salary without authority of the governing body, the common council. (*Ellis v. The Mayor*, 1 Daly, 102; *Briggs v. The Mayor*, 2 id. 304; *Donovan v. The Mayor*, 33 N. Y. 291.) Professional services may be contracted for without bids. (*McDonald v. The Mayor*, 68 N. Y. 23; *O'Connor v. The Mayor*, 11 Hun, 176; *McDonald v. The Mayor*, 4 T. & C. 177, 178.)

*Nelson J. Waterbury* for respondents. The commissioner of public works had power to appoint the plaintiff janitor of premises occupied by certain police and district courts, and he is entitled to be paid out of the appropriation to pay the janitors for those courts, unless other parties have a legal claim to be paid therefrom to their exclusion. (*Kennedy v. The Mayor*, 79 N. Y. 361, 363.) No other person than the janitors employed by the commissioner of public works has a legal claim to be paid out of the appropriation for the payment of janitors under the condition annexed to it by the board of estimate and apportionment. (*Bergen v. The Mayor*, 5 Hun, 243; 1 Laws of 1857, 724, 874, 877; 1 Laws of 1870, 366, 371; Laws of 1873, 484, 489.)

EARL, J. The plaintiff commenced this action to recover of the city of New York his salary for the year 1879, as janitor of the building in which the sixth district civil court in that city held its sessions. Phillip Cummisky was joined as a defendant upon the allegation that he claimed an interest in the subject of controversy adverse to the plaintiff.

The plaintiff claimed to have been appointed janitor of the court building by the commissioner of public works, and Cum-

misky claimed to have been appointed janitor of the sixth district civil court by the justice of that court.

The board of estimate and apportionment for the city of New York, in December, 1878, made appropriations for the support of the city government for the year 1879, and they appropriated "to pay salaries of twelve janitors, at \$1,200 each per annum in the civil and police courts as follows:" and then the twelve courts are named, with \$1,200 opposite to each, among which is the sixth district civil court. The sums thus appropriated amount to \$14,400 and at the foot of the appropriation is the following:

"The above appropriation of \$14,400 is made specially, as no provision is otherwise made in this final estimate, for the salaries of the janitors of these courts. No portion of this appropriation, however, is to be paid by the comptroller until the question is judicially determined, on an adjusted case or otherwise, in whom by law the appointment of janitor of these courts is placed. It is claimed, on one hand, that the appointment is in the board of police justices and justices of the civil courts, and on the other, that the appointment is in the commissioner of public works. The city is not to be burdened with the expense of two sets of janitors."

By the city charter of 1873 (chapter 335, section 71), it was provided that the department of public works should have the care of public buildings, and the claim of the plaintiff is that the power to appoint the janitor of such buildings was thus vested in that department, and that his appointment was, therefore, valid. It was so held by this court in the case of *Kennedy v. The Mayor, etc.* (79 N. Y. 361), and so much may now be regarded as settled. It was also held in that case that the appropriation by the board of apportionment was in form sufficient to authorize the payment of the plaintiff's salary except for the condition attached to it, which is above set out, and that such condition could be lawfully attached.

Kennedy in that case was in the same position as the plaintiff in this, but the adverse claimant to the salary of janitor there was not made a party, and hence the judgment there was

reversed on that ground, the court holding that the adverse claimant should be made a party to the action so that a judgment rendered therein should bind him and protect the city against his claim and thus comply with the condition attached to the appropriation. So we must take it as decided that this is a proper case for impleading Cummisky as an adverse claimant with the city.

But little, therefore, remains to be determined now. Cummisky did not hold a lawful appointment of janitor. There was no law which authorized the justice of the civil court to appoint him. By section 65 of chapter 344 of the Laws of 1857, it is provided that "the corporation of the city of New York shall furnish, at the expense of that city, all necessary attendants, rooms, furniture, blanks, stationery and fuel for these courts," meaning the District Courts of the city of New York. That is a power to be exercised by the corporation, and the provision confers no power upon the justices of these courts. But March 15, 1870, the common council adopted the following resolution: "*Resolved*, That the justices assigned to each of the police courts of this city and the justices of the several district civil courts be and they are hereby authorized and empowered to appoint a janitor for each of said police and civil courts at an annual salary of \$1,500 each, payable monthly." Cummisky is supposed to have been appointed under this resolution.

A janitor is understood to be a person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them.

A janitor, as distinguished from attendants, the common council had no authority to furnish for these courts. By the city charter of 1857 (chapter 446, section 23), an act later than the act chapter 344, above referred to, the care of public buildings was conferred upon the street department, and such care has since been in that department and its successor, the department of public works. Therefore, certainly since the act chapter 446, the common council could not appoint and could not delegate the power to appoint a janitor to take charge of any of the public buildings.



But it is said that the appropriation was to pay, not janitors of the court buildings, but court janitors, and that Cummisky was appointed the court janitor for the sixth district civil court. We do not think this a fair construction of the appropriation. It was to pay janitors in the several courts mentioned. The board of apportionment was willing to recognize but one janitor for each court, and it found two persons claiming to act as janitor, one under appointment of the commissioner of public works and the other under appointment by the justice of the district civil court, and it meant the appropriation for the one of the two who was legally appointed and who should be adjudged to have been so appointed.

We cannot recognize any distinction between a janitor of the court and a janitor of the building in which the court is held. Both must be construed to mean the same thing. A janitor of the court, as distinguished from an attendant upon the court, must be a person discharging the same duties as a janitor of the court building. If by janitor of the court is meant simply an attendant upon the court, then such janitor is provided for in an item of appropriation made by the board of apportionment "for salaries of clerks, stenographers, interpreters and attendants." We are, therefore, of opinion that there was but one janitor who could legally serve in the sixth district civil court building and that he was the plaintiff, and that he alone is entitled to pay out of the appropriation above referred to.

We conclude, therefore, that the judgment in this case should be affirmed, with costs.

The views here expressed probably determine the cases of *Golden*, *Kennedy* and *O'Brien*, so far as concerns the merits of those cases. But the counsel for the corporation claims that those cases are not properly before us and he did not argue them, and no one appeared for the co-defendants with the city in those cases. We do not understand the precise position of those cases before us. We have no papers showing that they are regularly here. We do not, therefore, decide them.

All concur.

Judgment affirmed.

## Statement of case.

JOHN F. SMYTH, Superintendent, etc., Respondent, v. JULIA T. MUNROE et al., Appellants.

Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of the mortgagor that there is no legal or equitable defense to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has been accepted, from disputing such statements.

Defendant A. executed to an insurance company his bond for \$40,000, secured by mortgage executed by him and by defendant J., his wife, upon lands owned by the latter. At the same time the mortgagors signed a written instrument in which they consented to the assignment of the mortgage to the superintendent of the insurance department, and stated that no portion of the mortgage debt had been paid and that there was "no offset to or legal or equitable defense to the same." The insurance company became insolvent and a receiver of its effects was appointed. In an action by the superintendent to foreclose the mortgage, wherein the defense of usury was interposed, it appeared that it was the custom of the insurance department to require such statements as a condition precedent to the acceptance of assignments of mortgages, and that the instrument was taken and deposited with the other papers in the office of the superintendent. *Held*, that it was to be presumed that the superintendent acted in accepting the assignment, and as an essential part of the transaction, upon the faith of the representations in said instrument; that, therefore, a finding to that effect was justified; and that defendants were estopped from availing themselves of said defense.

Also *held*, that in the absence of proof of fraud, or want of knowledge, it was a legal presumption that the parties executing said instrument did so with knowledge of its contents; and that this presumption was not affected by the fact that one of them was a married woman; also, that as against a person who had acted upon the faith of her representation she could not be exonerated therefrom by reason of her ignorance.

Also *held*, that knowledge on the part of the insurance company of the usury could not be attributed to and did not affect the superintendent.

Also *held*, that evidence was competent showing the custom of the department in such transactions.

(Argued February 8, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order

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made January 6, 1880, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court, on trial at Special Term. (Reported below, 19 Hun, 550.)

This action was brought by plaintiff, as superintendent of the insurance department of the State of New York, to foreclose a mortgage executed by defendants, Allen Munroe and Julia T., his wife, upon lands owned by the latter, given to secure a bond of the former.

The bond and mortgage were executed to the New York State Life Insurance Company, to secure the sum of \$40,000 loaned to Allen Munroe. Mrs. Munroe and Belden, the assignee in bankruptcy of Allen Munroe, were the only parties who answered the complaint; they severally set up the defense of usury. The mortgage was on the day of its execution, transferred and assigned by the life insurance company, unto Orlow W. Chapman, the predecessor in office of the plaintiff as such superintendent, and in consideration of such transfer the company received from the superintendent \$40,000 in government bonds, which had theretofore been deposited in the insurance department as security to the policy-holders in pursuance of law.

Simultaneously with the execution of the said bond and mortgage the said Allen and Julia T. Munroe executed an instrument as follows:

"The undersigned, mortgagor or mortgagors in the mortgage above mentioned and the present owner or owners in fee of the mortgaged premises, do hereby consent to the assignment of said bond and mortgage to the superintendent of the insurance department of the State of New York, and do hereby certify and agree that there is now unpaid and due, or to become due, on said bond and mortgage the principal sum of \$40,000 with interest thereon from the 12th day of December, 1873, and there is no offset to or legal or equitable defense against the same.

"Dated this 12th day of December, 1873.

"ALLEN MUNROE,

"JULIA TOWNSEND MUNROE."

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Which instrument was duly acknowledged. This instrument, with the acknowledgment thereof, appeared upon the same paper upon which the assignment from the insurance company to the superintendent of the insurance department was written or printed.

It appeared that it was the custom of the insurance department to require statements similar to those contained in said instrument before accepting assignments of mortgages. All of the papers were delivered together to and were filed in the insurance department.

The counsel for the defendants requested the court to find the facts constituting the usury, which the court refused; also, that the superintendent of the insurance department did not rely upon the statement in the certificate contained and was not influenced thereby in taking the assignment of the bond and mortgage and in paying therefor; also, that the said superintendent at the time he took the assignment of the said bond and mortgage was informed, or had sufficient knowledge to put him upon inquiry, of the true consideration upon which the bond and mortgage had been made to the life insurance company. The court refused to find either of said propositions as requested; on the contrary, found that the superintendent accepted the bond and mortgage and delivered the United States bonds in exchange, relying upon the truth of the statement contained in said instrument.

Among other findings of fact, the court did find: "That at the time the said Julia T. Munroe executed the said certificate she had no knowledge of the purpose for which it was required, or that it was to be used in any manner whatever, and that in the absence of such knowledge she signed the same at the request of her said husband and without any knowledge or information of the use which was to be made of the same."

Mrs. Munroe was not examined as a witness, and no evidence was given to support this finding.

Further facts appear in the opinion.

*George N. Kennedy* for appellant. The bond and mortgage

was as to the defendants James J. Belden, assignee in bankruptcy of Allen Munroe, and Julia T. Munroe, usurious and void. (*Rose v. Rose*, 7 Barb. 176; *Souwerlye v. Arden*, 1 Johns. Ch. 240.) The mortgage and bond being void for usury, defendants can avail themselves of the defense against the plaintiff as assignee of said security, and were not estopped by the certificate given by them at the same time, and concurrent with the execution of the mortgage. (*De Zell v. Odell*, 3 Hill, 222; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 395; *Truscott v. Davis*, 4 Barb. 495-8; *Dinkenfiel v. Franklin*, 7 Hun, 340; *Mallory v. Heran*, 49 N. Y. 111; *Payne v. Burnham*, 62 id. 69; 7 T. R. 604; *Lowesbury v. Depue*, 28 Barb. 47.) It is not sufficient to create an estoppel that the certificate was believed to be a protection as matter of law. (*Wilcox v. Howell*, 44 N. Y. 399; 38 N. Y. Super. Ct. 7; *Mallory v. Horan*, 49 N. Y. 111, 115.) The certificate having been executed at the same time and concurrent with the execution of the mortgage, and being a part of the same transaction, it can have no other or greater effect than it would have had if it had been written in the body of the mortgage. (*Wilcox v. Howell*, 44 Barb. 401; 44 N. Y. 398; *Mechanics' Bank v. New Haven R. R. Co.*, 3 Kern. 638.) An indispensable requisite of an estoppel *in pais* is that the conduct or representations were intended to, and did in part, influence the other party to his injury. (*Payne v. Burnham*, 62 N. Y. 69, 73.) The plaintiff cannot avail himself of the doctrine of estoppel against the mortgagor by reason of his relations of trustee to the mortgagee. (*People ex rel. Stout v. Chapman*, 5 Hun, 222, 224; *Ruggles v. Chapman*, 59 N. Y. 165; *Sharpley v. Abbott*, 42 id. 450-1; *Flagg v. Munger*, 5 Seld. 492.)

*R. W. Peckham* for respondent. There was no usury proved in the case on the part of the New York Life Insurance Company, or for which it was in any way liable. (*Adrianse v. Roome*, 52 Barb. 399; *Ins. Co. v. Ins. Co.*, 7 Wend. 31; *Risley v. Railway Co.*, 1 Hun, 202; *Brouwer v. Appleby*, 1 Sandf. 158; *Hoyt v. Thompson*, 5 N. Y. 320; *Bank v. Norton*, 1

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Hill, 572, 579; *Bank v. Bank*, 17 Mass. 1, 28; Angell & Ames on Corporations [4th ed.], §§ 291-297; *Sniffen v. Koechling*, 13 J. & S. 61; *Estevey v. Purdy*, 66 N. Y. 446; *Bank v. Railroad*, 13 id. 599, 631, 633, 634; *Clark v. Metropolitan Bank*, 3 Duer, 241; *Thompson v. Bank*, 5 Bosw. 293, 309; *Walsh v. Ins. Co.*, 73 N. Y. 5, 10; *Ins. Co. v. Minch*, 53 id. 144; L. R., 15 Ch. Div. 639-643; *Buffett v. Railroad Company*, 40 N. Y. 163.) An action to foreclose the mortgage could have been maintained by the insurance company itself. (*Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 id. 165; *Lee v. Chadsey*, 3 Abb. Ct. App. Dec. 43; *Estevey v. Purdy*, 66 N. Y. 446; *Sniffen v. Koechling*, 13 J. & S. 61.) Assuming the existence of usury in the mortgage, rendering it invalid in the hands of the Insurance Company the certificates signed by defendants Munroe, and the facts found by the court based upon it, estop the defendants from raising the question of usury. (*Mason v. Anthony*, 3 Abb. Ct. of App. Dec. 207; *S. C.*, 3 Keyes, 609; *Payne v. Burnham*, 62 N. Y. 69; *Nichols v. Nussbaum*, 10 Hun, 214; *Smythe v. Lombardo*, 15 id. 415.) There is no presumption of law in civil cases that a married woman acts under the compulsion of her husband in any thing. (*Seiler v. The People*, 77 N. Y. 411.) There is no such relation between plaintiff and the Insurance Company as to prevent the doctrine of estoppel from being applied herein. (*Ruggles v. Chapman*, 59 N. Y. 163; 64 id. 557; *Matter of Att'y-Gen. v. Guardian Mutual Life Ins. Co.*, 13 Hun, 115; 74 N. Y. 617; *Stilwell v. Carpenter*, 62 id. 639.) Knowledge in the company of the existence of usury would have no bearing upon the superintendent as against the certificate, even though it should be claimed that the superintendent is also the trustee for the company and the company had knowledge of the facts. (Laws of 1853, chap. 463, as amended; Laws of 1862, chap. 300, § 2.) There being no usury, a refusal to find upon the question one way or the other was immaterial. (*Stewart v. Morris*, 79 N. Y. 629.) Belden, as assignee, could not set up the

defense of usury against the certificate of his assignor. (*Curtis v. Leavitt*, 15 N. Y. 1; *Van Heusen v. Radcliffe*, 7 id. 580.)

MILLER, J. The principle is well established in this State that where an assignee takes a chose in action by assignment, with the debtor's assent, and on the faith of a representation made at the time, the debtor is estopped from impeaching it by any defense inconsistent with his declaration. And it is adjudged, by repeated decisions of this court, that the doctrine of an estoppel *in pais* may be interposed in such a case against the defense of usury. (*L'Amoreux v. Vischer*, 2 Comst. 278; *Mason v. Anthony*, 3 Keyes, 609; *Payne v. Burnham*, 62 N. Y. 69.) The statement in the certificate of Allen Munroe and Julia T., his wife, to the effect that to the bonds and mortgage therein mentioned, the last of which is the subject of foreclosure in this action, there was no legal or equitable defense, was evidently made for the purpose of inducing a belief that such statement was true. And if the bond and mortgage was received upon the strength and by reason of such statement and certificate, no valid reason exists why the parties who made the same, and all persons claiming under them, are not estopped from urging to the contrary, or asserting that the representation is untrue and different from the fact actually existing. It appears, in this case, that, at the time and concurrent with the execution of the bond and mortgage, an instrument was executed by the mortgagors consenting to the assignment of the same to the superintendent of the insurance department of this State, and that the papers were taken and deposited with said superintendent, and the findings of the court show that the bond and mortgage was received by him relying upon the truth of the statements contained in the certificate. The presumption of law, in view of the purpose for which the bond and mortgage was assigned and the fact that it was received, in accordance with the customary routine of business of that department, is that ordinary caution was used, and the proof shows that it was the practice to require a certificate of the same tenor and effect in all transactions of a like character. In fact, such

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a course was indispensable to the safety and security of those for whose benefit bonds and mortgages might be assigned ; and a public official, having charge of securities of this description, would be delinquent in the performance of his duty and as a business man who failed to exact proof that the obligation received was valid and legal and not tainted by a usurious consideration. Taking into account that the official duty of the officer absolutely required this degree of vigilance and care, as well as ordinary business rules, and the presumption, which is always to be indulged, that a public officer acts in good faith until the contrary is proved, it must be assumed that the representation made by the certificate was a very important and essential part of the transaction, as well as an inducing cause for taking the bond and mortgage ; and without this, the superintendent would never have parted with the bond in his possession of the same amount and of equal value. The claim, therefore, that there is no evidence that the certificate was ever shown to, or seen by, the assignee or superintendent, or that he had heard of its existence at the time of the assignment, is not well founded. The evidence shows that it was the custom of the department to require, before accepting the assignment of any bond and mortgage, such a certificate ; that the certificate with the other papers was carried to the superintendent's office ; and to say that it was not looked at, examined and understood, and did not constitute the very essence of the matter, is contrary to all reasonable inferences to be derived from the object in contemplation, and the nature and purpose of the transaction. The evidence relied upon by the appellant's counsel to sustain the position contended for is susceptible of a different construction. A literal reading would make the witness testify to the existence of the certificate of an affidavit of regularity, which is not proved ; and as it does not appear that there was any other certificate introduced upon the trial except the one signed by the mortgagors, the fair and reasonable intendment is that the witness included the latter, as well as the affidavit of regularity and that of the appraisers, which are mentioned. This interpretation comports with the usual course of business, and



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with the inference to be drawn from the fact that a certificate had been taken, and that it must have been executed for the purposes for which it was used. Although the evidence relating to the custom as to requiring a certificate is contained in a stipulation, yet it was manifestly sufficient to establish such custom and properly admitted upon the trial. The claim that the certificate alone is not sufficient to create an estoppel *in pais*, and that it must be shown that the acts, declarations or omissions, out of which the estoppel arises, influenced the conduct of the superintendent, and that he acted in reliance upon the same, is answered by the remark that it is entirely clear that he would not have taken the assignment of the bond and mortgage and parted with the bonds he held, unless this certificate had been given. It was not only a rule and regulation, but a necessity; and the only way in which he could fully obtain knowledge of the facts, and protect the public against loss by mortgages which were usurious and void. Under these circumstances, it cannot, we think, be questioned, that the superintendent believed and relied upon the statement in the certificate as true, and that his action was dictated thereby, within the principle of the decisions cited by the appellant's counsel. (See *Malloney v. Horan*, 49 N. Y. 111; *Wilcox v. Howell*, 44 id. 399.)

The fact that Mrs. Munroe was a married woman when the certificate was executed does not aid the defendants; and the finding of the court, to the effect that she had no knowledge of its purpose, and in the absence of such knowledge she signed the same without any knowledge or information of the use which was to be made of it, is adverse to the inferences to be drawn from the certificate itself, and from the circumstances attending the transaction. All of these bear witness that the design was to assign the mortgage to the superintendent, and that this was to be done upon the strength of the statement made as to the validity of the mortgage. It is a presumption of law that a party executing an instrument does so with knowledge of its contents; and as Mrs. Munroe was not examined as a witness, and there is no proof that she did not know its contents, it must be assumed that she did. Without

any proof of fraud or want of knowledge, it certainly would not be safe, or in accordance with any sound principle, to hold that a married woman is exonerated from the statements she has made by reason of her ignorance. In *Payne v. Burnham* (*supra*), the doctrine of estoppel in such a case was upheld. So long as she intrusts such a statement in the hands of her husband with power to use it, she makes him her agent and is bound thereby. The finding referred to is not material, as the court also found that Mrs. Munroe was estopped by the certificate from setting up the defense of usury, and this should control. The claim that it was not executed with a view to influence the action of the assignee is in opposition to the finding last stated, which is fully sustained by the evidence. It is clearly evident that it did influence the superintendent; and without the certificate of both the mortgagors the assignment would never have been accepted. Nor is there any valid reason why the plaintiff cannot avail himself of the doctrine of estoppel against the mortgagor. He holds the securities as trustee for the benefit and for the security of the policy-holders, under the act of April 8, 1851. Upon the insolvency of the insurance company and its dissolution and the appointment of a receiver, it is his duty to keep those securities, convert them into money, and distribute the funds among the *cestuis que trust*. (*Ruggles, Receiver, v. Chapman*, 59 N. Y. 163; *S. C.*, 64 id. 557; *Matter of Guardian M. L. Ins. Co.*, 13 Hun, 115; 74 N. Y. 617.)

At the time of the commencement of this action the New York State Life and Trust Company, to whom the mortgage was executed, was insolvent, as the records of this court show, and a receiver appointed to take charge of its effects, and to wind up its affairs. Under the circumstances, the knowledge of the company of the existence of the usury could not well be imputed to the superintendent.

But aside from this view, under the statute, by virtue of which the superintendent holds the securities, he is primarily a trustee for the policy-holders. (Sess. L. of 1853, chap. 463, as amended by Sess. L. of 1862, chap. 300, § 2.) The inten-

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tion of the law evidently was to place these securities beyond the reach of the company until the policy-holders are fully satisfied, and the superintendent could not be chargeable with the knowledge of the company that usury had been taken, even if the proof was clear that such knowledge existed. As already indicated, there was no error in the admission of the evidence contained in the stipulation, and we think that the plaintiff had a right to show the custom of the department in the transaction of business of this description. Nor was there any error in the refusal to find as requested upon the trial, or in the conclusion arrived at, that the defendants were estopped. As the estoppel precluded the defendants from interposing the alleged usury as a defense, it is not necessary to consider whether any usury was proved of which the insurance company had knowledge, or which of itself would defeat the collection of the bond and mortgage.

The judgment was right and should be affirmed.

All concur, except ANDREWS, J., taking no part.

Judgment affirmed.

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ANDREW M. JOHNSON, Respondent, v. HORACE J. HARVEY, as  
Administrator, etc., Appellant

The death of one of two or more co-sureties does not relieve his estate from a liability to contribute; the law implies a contract between the sureties originating at the time they executed the obligation by which they became such, to contribute ratably toward discharging any liability which they incur in behalf of their principal; and in case of the death of either, the obligation devolves upon his legal representatives the same as any other contract made by him, the breach of which occurs after his death.

*Waters v. Riley* (1 Harr. & Gill. 805), disapproved.

The authorities holding that as against the creditor, the estate of a deceased surety who has executed a joint obligation with others is discharged, distinguished.

*Tobias v. Rogers* (13 N. Y. 66), distinguished.

(Argued February 8, 1881; decided March 1, 1881.)

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Opinion of the Court, per FINCH, J.

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APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 5, 1880, which affirmed an order of Special Term overruling defendant's exceptions to the report of a referee; to whom a claim against the estate of John G. Allen, defendant's intestate, was referred under the statute, and confirming said report.

The nature of the claim and the facts appear sufficiently in the opinion.

*Frank R. Perkins* for appellant. The referee erred in finding that the estate of defendant's intestate was liable to contribute to the plaintiff. (*Cornes v. Wilkins*, 79 N. Y. 129; *Wood v. Fisk*, 63 id. 245; *Hollbrook v. Fose*, 27 Me. 441; *Ellis v. Ham*, 28 id. 385; *Tobias v. Rogers*, 13 N. Y. 66.) Although there might have been an original implied agreement between the sureties, there can be nothing implied against the estate represented by the defendant. Its liability must be determined upon the letter of the contract of suretyship, and it cannot by construction be extended beyond its express terms. (*McClosky v. Cromwell*, 11 N. Y. 593; *Pickersgill v. Lahens*, 15 Wall. 140; *U. S. v. Price*, 9 How. [U. S.] 90; *Tobias v. Rogers*, 13 N. Y. 66; *Randall v. Sackett*, 77 id. 480; *Getty v. Binsse*, 49 id. 388; *Wood v. Fisk*, 63 id. 248; *Risley v. Brown*, 67 id. 160; *Hauck v. Craighead*, id. 436; *Davies v. Van Buren*, 72 id. 589; *McNulty v. Hurd*, 18 Hun, 1.)

*A. G. Rice* for respondent. Between co-sureties the death of one does not relieve his estate from the liability to contribute, and that is so whether the contract is joint or several. (*Bradley v. Burwell*, 3 Den. 61; *Norton v. Coons*, id. 130; *Barry v. Ransom*, 12 N. Y. 462; *Bachelor v. Fish*, 17 Mass. 464; *Tobias v. Rogers*, 13 N. Y. 59; *Cornes v. Wilkin*, 21 N. Y. S. C. 428.)

FINCH, J. The plaintiff and the defendant's intestate, in the life-time of the latter, were joint sureties in an undertaking given in an action for the claim and delivery of personal prop-

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erty, in which action one Parshall was plaintiff, and the sheriff of Erie county defendant. Neither of the sureties were parties to that action, but executed the undertaking for the accommodation of the sheriff, or those claiming through him. Before a trial of that litigation one surety, John G. Allen, died, and the present defendant was duly appointed his administrator, and thereafter judgment was obtained in the action in which the undertaking was given, and the surviving surety, by reason of his liability thereon, compelled to pay the sum of \$1,592.74. For the one-half part of this he now claims contribution from the estate of his co-surety, and the sole question presented and argued is, whether such contribution can be enforced. The question is hardly an open one in this State. It was held in *Bradley v. Burwell* (3 Den. 61) that the death of one of two or more sureties did not relieve his estate from the liability to contribute, and the decision was put upon the ground that the law implies a contract between co-sureties to contribute ratably toward discharging any liability which they may incur in behalf of their principal, such contract originating at the time they execute the original undertaking, and that in the case of the death of either this obligation devolves upon his legal representatives, and is like any other contract made by one, in his life-time, to pay money at a future time, absolutely or contingently, who dies before any breach of the contract. The English cases on the subject were cited in the opinion of the court, as also those of Massachusetts; and it is also to be observed that, in the argument then made, the case of *Waters v. Riley* (1 Harr. & Gill. 305) was cited by the learned counsel who contended against the liability of the deceased surety's estate, as it is again brought to our attention here. That case was decided by a divided court, and, like the authorities in Pennsylvania, went upon the ground that the liability of the sureties to each other rested, not upon contract express or implied, but was the product and the mere creature of equity. In *Bradley v. Burwell* the same ground was distinctly taken on the argument, and advocated by an ability which never left unsaid what was worthy to be uttered, and

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yet the court determined that the liability of the co-surety rested upon an implied contract to contribute, originating at the date of the joint signature, and which bound the estate of one or more who died before the principal liability accrued. The learned counsel for the appellant seems to have been led into a doubt of the authority of *Bradley v. Burwell*, and to a hope that we would disregard it, from what has been said by us in cases where the creditor, and not the co-surety, was pursuing a supposed remedy against the estate of a deceased surety. In those cases, which were cases of joint obligation, we have held that such estate is absolutely discharged, both in law and equity; that death puts an end to the obligation of the surety; that the survivor only is liable; stating the conclusion with some force and strength of phrase. But the doctrine was neither new nor recent. The same thing had already been said in *Bradley v. Burwell* without at all modifying the view expressed as to the liabilities of the sureties between themselves. The argument, from general expressions, wrested from their aim and purpose, detached from their setting, is often plausible, but rarely useful or effective. We have often held, as between the creditor and the estate of a deceased surety, that the joint obligation of the latter ended with his death. We are not yet prepared to decide that his several obligation, originating at the date of the common signature, to contribute ratably to the payments compelled from his associates, also terminates at his death. In *Norton v. Coons* (3 Den. 130) the sureties were all living, and the precise question did not arise, but it was again held that, while contribution between sureties was founded on a general principle of equity and justice, yet what had been an equitable had become a legal right, and that in such case the law will, for all the purposes of a remedy, imply a promise of payment. In the case of *Tobias v. Rogers* (13 N. Y. 66) the surety was held not liable to contribute because relieved in his life-time from all liability, either as obligor or co-surety, by a discharge in bankruptcy. It was there said that the defendants in the replevin suit could have released one of the sureties with the assent of the other,

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and that to the act of the legislature, providing for a discharge in bankruptcy, such other surety in common with every other citizen, is presumed to have assented. The reasoning has no application to the case of a deceased surety. And while the court added that contribution was not founded upon contract, it was further said that the law following equity will imply a promise to contribute in order to afford a remedy. The justice of such a rule is apparent. Originating in equity, it has been grafted upon the law with the aid of an implied promise to secure the legal remedy. We see no reason to reverse it, but every consideration of equity and justice leads us rather to maintain, and enforce it. The decision of the court below was, therefore, right.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THE HIBERNIA NATIONAL BANK, Respondent, v. LEOPOLD LACOMBE et al., as Commissioners, etc., Impleaded, etc., Appellants.

The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid and he is notified, he becomes absolutely bound to pay the amount at the place named.

The rights of the parties, therefore, are to be governed by the laws of the place of payment.

An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this State.

A foreign creditor rightfully in a court of this State, pursuing a remedy given by the statutes of the State, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as a citizen.

The plaintiff, a National bank organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly

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protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that, under and within the meaning of the provision of the Code of Procedure (§ 427\*), providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident, that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action.

After the delivery of the draft to plaintiff, the M & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property. *Held*, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment.

The authorities as to the *lex loci* controlling bills of exchange collated and discussed.

(Argued February 10, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 14, 1880, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 21 Hun, 166.)

This action was brought upon a draft drawn by defendant, the Mechanics & Traders' Bank of New Orleans, upon M. Morgan's Sons, bankers of New York city, dated New Orleans, March 17, 1879, payable to the order of plaintiff.

The facts appear sufficiently in the opinion.

*William Henry Arnoux* for appellants. All the proceedings taken herein against the bank were void, because the said bank had ceased to exist as a corporation before the action was commenced. It had no capacity to sue or to be sued. (*State Savings Asso. of St. Louis v. Kellogg*, 52 Miss. 583; *Thornhill v. The Bank*, 1 Wood's U. S. C. C. 1; *Mudge v. Commrs. of Exch. Bkg. Co.*, 10 Rob. [La.] 464; *Dorville v. City Bank*,

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\* See Code of Civil Procedure, § 1780.



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9 id. 362; *French v. Stanton*, 1 La. Ann. 8; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Willitts v. Waite*, 25 N. Y. 581.) The obligation of parties to commercial paper is to be ascertained and determined, not by the law of the place where the payment is to be made, but by the law of the place where such contract has its legal inception. (*Everett v. Vandryes*, 19 N. Y. 436; *Aymar v. Sheldon*, 12 Wend. 439; *Cook v. Litchfield*, 5 Sandf. 330; *Duscomb v. Bunker*, 2 Metc. 8; *Lowry's Admrs. v. Bank of Georgia*, 7 Ala. 120; *Dunn v. Adams*, 1 id. 527; *Cox v. Adams*, 2 Kelly [Ga.], 158; *Hatcher v. M' Morine*, 4 Devereux, 122; *Dow v. Rowell*, 12 N. H. 49; *Yeatman v. Cullen*, 5 Blackf. 240; *Holbrook v. Vibbard*, 2 Scam. 465; *Trimley v. Vignier*, 1 Bing. N. C. 151; *Slocum v. Pomery*, 6 Cranch, 221; Story on Prom. Notes, § 339 and notes; *Dundas v. Bowler*, 3 McLean, 397; *Norton v. Cook*, 9 Conn. 314; *Burrows v. Jemino*, 2 Stra. 733; Story on Prom. Notes, § 168; Story on Bills, § 165; *Rouquette v. Overmann*, L. R., 10 Q. B. 536; *Clopton v. Hall*, 51 Miss. 482; Rorer on Interstate Law, 49; *Fitch v. Remer*, 1 Bliss, 337; *Phil. Loan Co. v. Towner*, 18 Conn. 249; *Levy v. Levy*, 78 Penn. St. 507; 2 Kent's Com. 560, note *d*; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283, 293; *Willitts v. Waite*, 25 id. 577; *Cantwell v. Dubuque W. R. R.*, 17 How. 16; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Western Bank v. City Bank of Columbus*, 7 How. 238; *Bank of U. S. v. The U. S.*, 2 How. [U. S.] 711; *De Wolf v. Johnson*, 10 Wheat. 367; 6 Curtis, 438; *Cope v. Alden*, 53 Barb. 350; *Dolman v. Cook*, 1 McCarter, 56; *Campion v. Kille*, id. 229; *Andrews v. Torrey*, id. 355; *Chase v. Dow*, 47 N. H. 405; *Musson v. Lake*, 4 How. [U. S.] 262; *Wood v. Gibbs' Admr.*, 35 Miss. 560; *Matter of Glyn*, 15 Nat. Bank. Reg. 495; *Cooper v. The Earl of Waldegrave*, 2 Beav. 282; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Rouquette v. Overmann*, L. R., 10 Q. B. 525; *Gibbs v. Fremont*, 9 Exch. 25; 22 L. J. [Ex.] 302; *Crawford v. Branch Bank*, 6 Ala. [N. S.] 15; *Bailey v. Heald*, 17 Tex. 102; *Snaith v. Mingay*, 1 M. & S. 87; *Baker v. Sternes*, 9 Ex. 684; *Robertson v. Burdekin*, 1 Ross' Leading

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Cases, 812; 1 Daniel on Neg. Inst. 743, § 898; *Freese v. Brownell*, 35 N. J. L. 286; *Everett v. Vendryes*, 19 N. Y. 436; *Hunt v. Standart*, 15 Ind. 33; *Raymond v. Holmes*, 11 Tex. 55; *Kuenzi v. Elvers*, 14 La. Ann. 391; *Lenning v. Ralston*, 23 Penn. St. 137; *Price v. Page*, 24 Mo. 67; *Bonedon v. Page*, id. 595; *Page v. Page*, id. 596; *Bk. of U. S. v. U. S.*, 2 How. 711; 1 Daniel on Neg. Inst. 721, § 865; *Hyde v. Goodnow*, 3 N. Y. 266; *Evans v. Anderson*, 78 Ill. 558.) Drawers are simply sureties, and are held according to the law of the place where the bill is drawn, that is, the place where their contract is made. (*Allen v. Mer. Bk. of N. Y.*, 22 Wend. 215, 240; *Bk. of Rochester v. Gray*, 2 Hill, 227; *Carroll v. Upton*, 2 Sandf. S. C. 171; *Allen v. Kemble*, 6 Moore's P. C. 314; Phillimore's Internat. Law, § 1349 [4th ed.], p. 661; *Hicks v. Brown*, 12 Johns. 142.) All personal contracts are to be governed by the law of the place of contract. (*Ivey v. Lalland*, 42 Miss. 444; 2 Am. Rep. 606; *Upton v. Hubbard*, 28 Conn. 274, 286; Story's Confl. of Laws, § 514; *Burns v. Provincial Ins. Co.*, 35 Barb. 525; *Matter of Wilder*, 22 La. Ann. 219; 2 Am. Rep. 721; *Lenning v. Ralston*, 23 Penn. St. 137, 140.) Where a law of limitation of actions operates upon the debt, the courts of every State will sustain that defense when the defense is good in the State in which the contract was made, on the principle of upholding *lex loci contractus*. (*Perkins v. Guy*, 55 Miss. 153; 30 Am. Rep. 510; *Baker v. Stonebraker*, 36 Mo. 338, 340.) The instrument sued on is not in the law merchant a bill of exchange; because it has never been accepted. (*Jones v. Pacific W. Co.*, 29 Am. Rep. 308.) The breach of the drawer's contract was not here, but in New Orleans. (2 Daniel's Negotiable Instruments [2d ed.], § 970; Chitty on Bills, 266, 93, 217; *Fitzgerald v. Staples*, 88 Ill. 234; 30 Am. Rep. 551; Bayley, 28; Story's Confl. of Laws, 208; *Hicks v. Brown*, 12 Johns. 142; *Aymar v. Sheldon*, 12 Wend. 445.) The right of action against foreign corporations exists only by statute, and is limited to property in this State; as to the ownership of which property they differ in nowise from individuals. (*Hulbert v. Hope M. I. Co.*, 4

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How. 275; *Gibbs v. Queens Ins. Co.*, 63 N. Y. 114; *Brewster v. Michigan C. R. R.*, 5 How. 183; *Whitehead v. Buffalo & L. H. R.*, 18 How. Pr. 218, 232; *Case v. Ohio Ins. Co.*, 2 C. R. 82; *Van Buskirk v. The Hartford Fire Ins. Co.*, 14 Conn. 583.) The money deposited with M. Morgan's Sons, by said bank, became the property of the bankers, and the bank became their creditor. (*Matter of Franklin Bank*, 1 Paige, 249; *Chapman v. White*, 6 N. Y. 412; *Commercial Bank v. Hughes*, 17 Wend. 94; *Graves v. Dudley*, 20 N. Y. 76.) The said bank being a Louisiana corporation, the moneys due to it from M. Morgan's Sons were, in the eye of the law, likewise located in Louisiana. (*Willits v. Waite*, 25 N. Y. 584; *Hoyt v. Comm. of Texas*, 23 id. 224; 2 Kent's Com. 429; *Atwood v. The Protection Ins. Co.*, 14 Conn. 555, 562; *Van Buskirk v. The Hartford Fire Ins. Co.*, id. 583; *Milne v. Moreton*, 6 Binn. 361.) The plaintiff being a National bank organized under the law of the United States, and having its banking office in the city of New Orleans, was not a resident of the State of New York, but was a resident and citizen of the State of Louisiana, and it had no right to sue another foreign corporation in our tribunals. (*Bowen v. First Nat. Bk.*, 34 How. 408; U. S. R. S., §§ 5134, 5146; *Cook v. State Nat. Bk.*, 50 Barb. 339; 3 Abb. [N. S.] 339; *Western Bk. v. City of Columbus*, 7 How. 238.) The courts of one State will execute and give effect to an assignment affected by, and made operative under, the laws of another State, to the same extent and in the same manner as if voluntarily made by any individual, except where the interest of the citizens of their own or other States would be prejudiced thereby; and when to give effect to such foreign assignment would be contrary to the established law or policy of their own State. (2 Kent's Com. 406, 407, 454; *Osgood v. Maguire*, 61 N. Y. 524, 529; *Kelly v. Crapo*, 45 id. 86; *The Watchman*, 1 Ware, 233; *King v. Johnson*, 5 Harring. 31; *Varnum v. Camp*, 1 Greene [N. J.], 326; *Richmondville Manfy. Co. v. Prall*, 9 Conn. 487; *Ivey v. Lal-land*, 42 Miss. 444; 2 Am. Rep. 606; *Dunlap v. Rogers*, 47 N. H. 281; *Dalton v. Currier*, 40 id. 237, 248; *Sanderson v.*

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*Bradford*, 10 id. 264; *Saunders v. Williams*, 5 id. 213; 2 Pars. on Cont. 570, note e.) Where a citizen of a State pursues a fellow-citizen in another State, he may be treated as a trustee and called to account as such in the courts of his own State. (Story's Confli. of Laws, § 403, etc.; *Sill v. Worswick*, 1 H. Bla. 690; *Phillips v. Hunter*, 2 id. 402; *Hunter v. Potts*, 4 Term, 182; *Ex parte Frank*, 1 Cook's B. L. 336; *S. C.*, 7 Bing. 762; *Blake v. Williams*, 6 Pick. 312; *Harris v. Breed*, 7 Cush. 16; *Peck v. Hibbard*, 26 Vt. 698; *Engel v. Scheuerman*, 40 Ga. 206; 2 Am. Rep. 573; *Dehon v. Foster*, 86 Mass. 545; *Vail v. Knapp*, 49 Barb. 299; *Field v. Holbrook*, 3 Abb. 377; *Dobson v. Pearce*, 12 N. Y. 169; *Mitchell v. Bunch*, 2 Paige, 606; *Mead v. Merritt*, id. 402; *Bushby v. Munday*, 5 Mad. 297; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 583, 588; *Potter v. Brown*, 5 East, 131.) Every subject is to be deemed to be a party to the laws of his own government. (*Mather v. Bush*, 16 Johns. 233; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Touting v. Hubbard*, 3 Bos. & P. 291; *Conway v. Gray*, 10 East, 536; 2 Pars. on Cont. 568; *Campbell v. Hall*, Cowp. 208; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448.) In all cases where there is no law of the State violated, or the right of the citizen interfered with, and where the litigants are subject to the same laws, our courts refuse, on principles of comity, to interfere. (*Willits v. Waite*, 25 N. Y. 577, 587; Story's Confli. of L., § 413; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 583, 586; *Olivier v. Townes*, 2 Martin [La.], 97; *Abraham v. Plestow*, 3 Wend. 538, 549; *Holmes v. Remsen*, 20 Johns. 229.) Under this spirit of comity our courts have recognized that a foreign assignee in statutory assignments, or one deriving title through such assignee, has a standing in our courts. (*Hoyt v. Thompson*, 5 N. Y. 320, 344; Story's Confli. of L., § 420; *Willits v. Waite*, 25 N. Y. 584.) An assignee can, not only be a party in a State court, but he can sue for and recover penalties not known to the State court. (*Cook v. Whipple*, 55 N. Y. 150; *Thompson v. Sweat*, 73 id. 622; *Ansley v. Paterson*, 77 id. 156; *Claflin v. Houseman*, 93 U. S. [3 Otto]

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137.) The insolvent laws of every State operate upon the citizens of that State, and upon the claims held by them as against citizens of the same State, without respect to the place of origin or performance of the contract. (*Scribner v. Fisher*, 2 Gray, 43, 48; *Burrall v. Rice*, 5 id. 539; *Brown v. Collins*, 41 N. H. 405; *Baldwin v. Hale*, 1 Wall. 223; *Newmarket Bank v. Butler*, 45 N. H. 236; *Kelley v. Drury*, 9 Allen, 27; *Mather v. Bush*, 16 Johns. 233; *Hempstead v. Reed*, 6 Conn. 480, 491; *Norton v. Cook*, 9 id. 314; *Ogden v. Saunders*, 12 Wheat. 213; *May v. Breed*, 7 Cush. 42; *Darves v. Head*, 3 Pick. 144, 149; *Goodwin v. Jones*, 3 Mass. 517; *Lanokton v. Wolcott*, 6 Metc. 307; *Richardson v. Wyman*, 4 Gray, 555; *Dearborn v. Ames*, 8 id. 1; *Speed v. May*, 17 Penn. St. 94; *Lowry v. Hall*, 2 Watts & S. 131; *Milne v. Moreton*, 6 Binn. 360.)

*Thomas S. Moore* for respondent. An action against a foreign corporation may be brought by a non-resident, "when the cause of action shall have arisen, or the subject of the action shall be situated within the State." (Code of Procedure, § 427; Chitty on Bills, 144 [11th Eng. ed.]; *Cumberland Coal Co. v. Hoffman Coal Co.*, 30 Barb. 168; *Burckle v. Eckhart*, 3 N. Y. 132; *Johnson v. Adams Tobacco Co.*, 14 Hun, 89; 2 Kent's Com. \* 460; *Cooper v. Earl of Waldegrave*, 2 Beav. 282; *Bk. of Commerce v. The Rutland R. R. Co.*, 10 How. Pr. 1; *Whitshead v. Buffalo & L. H. R. R. Co.*, 18 id. 233; *Pomeroy v. Ainsworth*, 22 Barb. 128; *Conn. Mut. Life Ins. Co. v. Cleveland R. R. Co.*, 41 Barb. 9; 23 How. Pr. 180; *Everett v. Vendryes*, 19 N. Y. 436; *Spencer v. Rogers Locomotive Works*, 8 Bosw. 612; *Western Bk. v. City Bk. of Columbus*, 7 How. Pr. 238; *Cantwell v. Dubuque & West R. R. Co.*, 17 id. 16; *Citizens' Bk. v. Park Bk.*, 41 Barb. 599; 1 R. S. 771; 2 id. [6th ed.]) The Mechanics and Traders' Bank was not dissolved as against creditors attaching its property in this State. (1 Ray's Stats. of La., § 284; *Matter of Independent Ins. Co.*, 1 Holmes, 103, U. S. C. Ct. [Mass.]; *Thornhill v. The Bk.*, 1 Woods, 1; *Mat-*

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ter of *Washington Marine Ins. Co.*, 2 Benedict, 292.) Even though the decree of the District Court of Louisiana dissolved the Mechanics and Traders' Bank, it could only do so as regards its property in Louisiana. As to property in the State of New York it could take effect only subject to the claims of creditors. (*Hamilton v. Accessory Transit Co.*, 26 Barb. 46; *City Ins. Co. v. Com. Bank*, 68 Ill. 348; *Murray v. Vanderbilt*, 39 Barb. 140.) The laws of Louisiana could not affect the property in New York as against creditors, and as to them the property was liable to attachment as to defendant's debts. (*Holmes v. Remsen*, 20 Johns. 229; *Abrahams v. Plestoro*, 3 Wend. 548; *Hoyt v. Thompson*, 5 N. Y. 341; *Johnson v. Hunt*, 23 Wend. 91; *Willetts v. Waite*, 25 N. Y. 577; *Kelley v. Crapo*, 45 id. 86; Story's Conflict of Laws, §§ 413, 414; 2 Kent's Com. 406, 407.) The plaintiff has the same right to sue here as a domestic corporation. (2 R. S. 457, § 1; 3 id. [6th ed.] 744, § 1; *Merrick v. Van Santvoord*, 34 N. Y. 217; U. S. R. S., § 5136; U. S. Const., art. 4, § 2; *Citizens' Ins. Co. v. Com. Bk.*, 68 Ill. 348; *Betton, Assignee, v. Valentine*, 1 Curtis, 168; *Merrick's Estate*, 2 Ashmead, 485; *Lowring v. Hall*, 2 Watts & Serg. 129; *Harrison v. Sterry*, 5 Cranch, 302; *Ogden v. Saunders*, 12 Wheat. 262, 363, 364; *Blake v. Williams*, 6 Pick. 303; *Hoyt v. Thompson*, 5 N. Y. 351; *Abraham v. Plestoro*, 3 Wend. 538; *Johnson v. Hunt*, 23 id. 89.) The commissioners in liquidation of the bank, having been made defendants by an order of the court upon their own application, they are in the same position as the Mechanics and Traders' Bank would be were it defending the action, and it would have no defense. (*Willetts v. Waite*, 25 N. Y. 586; Story's Conflict of Laws, § 412 *et seq.*; Westlake's Conflict of Laws, § 281.) The deposit of the defendant, the Mechanics and Traders' Bank of New Orleans, with M. Morgan's Sons, was liable to attachment. (Code, §§ 646, 648; *Lyman v. Cartwright*, 3 E. D. Smith, 117; *Willetts v. Waite*, 25 N. Y. 577; *Crosby v. Lumberman's Bank*, Clarke's Ch. 234, 286; *Betton, Assignee, v. Valentine*, 1 Curtis, 171; *Blake v. Williams*, 6 Pick. 303.)

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Opinion of the Court, per DANFORTH, J.

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DANFORTH, J. The plaintiff is a corporation created under an act of Congress of the United States providing for the organization of banking associations. "The Mechanics and Traders' Bank" was also a banking corporation created under the laws of Louisiana, and each corporation had its place of business in the city of New Orleans. On the 17th day of March, 1879, the plaintiff purchased for value of the "Mechanics and Traders' Bank" a check made by them on that day, addressed to "M. Morgan's Sons," bankers in the city of "New York," whereby they directed that firm to pay to the order of the plaintiff \$10,000. On the 26th of March, 1879, the check was duly presented to the payees for payment. It was refused. The check was duly protested and notice thereof given to the drawer. On the 27th day of March, 1879, this action was commenced against the "Mechanics and Traders' Bank" as drawer, and an attachment issued thereon was served on M. Morgan's Sons, who had funds of the drawer in their hands. Prior to that day, but after the delivery of the check to the plaintiff, the "Mechanics and Traders' Bank" was placed in liquidation under the laws of the State of Louisiana, and certain persons were by the court in that State appointed commissioners to take possession of and administer its assets. They were afterward made defendants in this action, and set up in defense their appointment under the circumstances above mentioned, their title through it to all the property of the bank, and also that the Supreme Court of this State had no jurisdiction to issue the attachment herein or entertain the action. The plaintiff has had judgment, and the defendants insist upon these objections among others as grounds for reversing it:

First, as to the jurisdiction of the court: At the time the action was commenced, the Code of Procedure was in force, and section 427 provided, among other things, that an action against a foreign corporation might be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen within the State." For this purpose a foreign corporation is to be regarded as a non-resident. What does the statute mean? We have learned from Coke that "an

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action is the lawful demand of one's right," and from the Code that complaint therein "must contain a statement of the facts constituting a cause of action." In any given case, then, the cause of action must arise upon the facts, and these appearing, we have only to inquire where they occurred. The complaint in this case sets out the check, shows the performance of those things which the law merchant prescribes as necessary to be done to change the conditional liability of the drawer into an absolute one, and that the proper steps were taken to change it. There are thus placed before us two classes of facts: first, the contract and its obligations; second, the things done in pursuance of the contract. The argument for the appellants assumes that the first constitutes the cause of action, and, as the contract was made in Louisiana, therefore, excludes jurisdiction from our courts. Authorities are not needed to show that in general every contract is to be expounded and enforced by the law of the place where it is made. But the curious will find the ancient ones collected by Wedderburn, of counsel in *Robinson v. Bland* (1 Wm. Blackstone, 256), and more modern ones in Story's *Conflict of Laws* (*infra*). Thus, if a bill is drawn in France, and then indorsed in a way which is sufficient here but insufficient there, the indorsement would be held void. (*Trimbey v. Vignier*, 1 Bing. N. C. 151.) But this general rule admits of an exception, as where the parties at the time of making the contract had a view to a different kingdom. MANSFIELD, C. J., in *Robinson v. Bland* (*ante*), or as put by Mr. Justice THOMPSON in *Smith v. Smith* (2 Johns. 241), "unless the parties had a view to its being executed elsewhere, in which case it is to be considered according to the laws of the place where the contract is to be executed." Therefore, the English court held, in *Robinson v. Bland*, that a bill of exchange drawn in France by John Bland upon himself in England, payable to the order of the plaintiff, was invalid because given for a consideration void by English law, saying: "The bill is made payable in England and is, therefore, an English transaction and to be governed by the local law." And conversely, in *Rouquette v. Overmann, etc.* (L. R., 10 Q. B. 525), where the



subject under consideration was the liability of certain persons who, as drawers residing in London, had there made a draft upon certain French bankers in Paris, payable to the drawers' own order, but indorsed by them to the plaintiff. The drawers having been charged as drawers under the French law were sued by the plaintiff in London, and it being objected that the contract of the drawer was to be construed according to the laws of England, where he resided and where he made the bill, the court were of a different mind, saying: "It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it, as applicable to the substance of the contract, so far as presentment for payment is concerned, still less to a formality required on non-payment to enable the holder to have recourse to an antecedent party on the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract, which a party transferring for value the property in a bill of exchange makes with the transferee."

\* \* \* "He engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety;" and thus shows that the drawer contracted in view of the laws of the country where the bill was to be paid, and to such an extent that he was held to be affected by changes in the local law, viz.: the law of France. In that case, also, *Allen v. Kimble*, cited here by the appellants, is criticised and found to have "nothing to do with the law relating to bills of exchange;" and it is said that in deciding *Gibbs v. Fremont*, also cited by the appellants, *Allen v. Kimble* was followed, and the court withholds "any opinion as to the soundness of the decision." *Gibbs v. Fremont* (9 Ex. 25) decided that a bill of exchange drawn in California on Washington, in the District of Columbia, bore interest at California rate. But this is not only ques-

tioned by the later English cases (*supra*); it is contrary to the doctrine of earlier English cases, and to those of this State, some of which are collected in the note to page 32, vol. 9, Exchequer Reports, and to the principle upon which *Dickinson v. Edwards* (77 N. Y. 573) was placed, and to the reasoning and exposition of the law governing the interpretation of such a contract therein stated. And so in *Fanning v. Consequa* (17 Johns. 510), the general rule and the exception is stated in the same manner, viz.: If by the terms or nature of the contract it appears that it was to be executed in a foreign country, then the place of making the contract becomes immaterial. And in *Hyde v. Goodnow* (3 N. Y. 267), it is declared that the rights of the parties to a contract are to be determined by the laws of the place where the contract is to be performed. To the same effect is the doctrine of the common and civil law wherever administered, as may be seen by referring to the cases cited in those above noted, and in the more numerous ones collected by Judge STORY in support of the same proposition. (Story on Conflict of Laws [7th ed.], §§ 239-244.) But, again, the law of the place of contract is not necessarily one place. It is the law of all the places to which and for the purposes for which it has reference. A bill of exchange, therefore, is to be construed according to the laws of each place at which the contract contemplated that something is to be done by either of the parties. This is illustrated in *Rouquette v. Overmann* (*supra*), *Horne v. Rouquette* (L. R., 3 Q. B. Div. 514), by the decision of this court in *Everett v. Vandryes* (*infra*), and in *Lee v. Selleck* (33 N. Y. 615). The note in question, in the last case, was made by Benjamin Selleck, in and dated at New York city, payable to the order of George Selleck, in Morris, Ill., and at that place he indorsed it and sent it to the maker by mail, at Beloit, Wis. The maker sent it in like manner to the plaintiffs in New York city. The indorser having been duly charged was sued in this State by publication as a non-resident, and money in bank in New York city belonging to him was attached. The defense set up was that he indorsed the note in Illinois, and that by the laws of that State an indorsee could

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not be made liable until judgment and execution had been obtained against the maker. At the Circuit the defendant had judgment upon the ground that the law of Illinois governed. The General Term reversed it, stating the general rule governing contracts, as above referred to, and holding that the maker, by the terms of his contract, was to perform it in Illinois; but that the indorser was bound, as by an independent contract, to pay in New York. SUTHERLAND, J., saying: "By indorsing the note George Selleck undertook that, if when duly presented it was not paid by the maker, he, the indorser, would, upon being properly notified of the non-payment, pay the same to the indorsees or other holder. Where? Can there be a doubt that the indorser and indorsees contemplated, if the indorsees retained the note, that in default of payment by the maker the indorser was to pay the indorsees in New York? The maker, by the note, promised to pay at Morris, Ill.; but the indorser, by his indorsement, promised to pay to the indorsees in New York." As to him, therefore, the court held that the law of New York, and not that of Illinois, applied. Upon appeal to this court the conclusion of the General Term was approved. PORTER, J., saying: "The engagement of the indorser, though auxiliary in its character, was an independent contract, and could only be fulfilled by direct payment to the plaintiff in New York," and the judgment was affirmed. The general principles involved in the above discussion will, if applied to the facts in this case, render it easy of solution. In substance, the drawer undertakes that there shall be paid to the holders of the check the sum of money therein mentioned at the place named. These things are of the essence of the contract, and unless performed the object of the payee is defeated. It purchased the check in New Orleans because, as we may suppose from the paper itself, it wanted to remit money to New York, and for this it paid a valuable consideration. Although the paper is dated in New Orleans the drawer agrees that the payer shall receive the amount named in New York. We see, therefore, that the buyer of the draft does not want the money in New Orleans. The drawer of the draft has the money in

New York, and so the exchange is agreed upon. The check is evidence of the contract, and under the general law is the contract itself. In view of this the parties have contracted. The drawer undertakes that the drawee shall be found in the place where he is described to be, and shall have effects in his hands, and from these, or upon other consideration (good as between him and the drawer, and with which the payee has nothing to do), pay the check. He undertakes, therefore, that it shall be paid when presented, and although the drawee is designated to make the payment, he, as between the payee and drawer, is only an instrument of the drawer, and the latter, therefore, since he undertakes for his agent's act, "undertakes that it shall be done at all events." (*Mellish v. Simeon*, 2 H. Bla. 378.) The drawee at this stage of the transaction is under no obligation to the payee; but by receiving the check the payee agrees in the first instance to go to the drawee and give him an opportunity to comply with the direction of the drawer, and if he does not, and the drawer is notified thereof, the latter becomes absolutely bound to pay the amount named in the check. Where is this contract to be performed? Clearly in New York city. Nor could it be performed elsewhere.

The only object of the parties, payee as well as drawers, in entering upon it was to have the money paid in New York. This only was in contemplation of the parties. As is said in 2 Daniels' Negotiable Instruments, page 685: "He, the drawer, has contracted that the amount shall be there paid by the hand of B.," the drawee. Any other construction would render the contract meaningless, and productive only of mischief. The plaintiff, in New Orleans, wants money in New York. Defendant promises it shall be there for him, and, relying on that, the plaintiff pays in New Orleans the agreed amount. It is obvious that it cannot be ascertained whether the promise is kept until it is taken to New York, and then, upon the theory of the appellant, if it is not performed, the promise is to be returned to the drawer in New Orleans, and then, in New Orleans, the money is to be repaid. And thus, after delay, the plaintiff is restored to his original

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desire, and must find some other method of transferring his money to New York. There is before us a single undertaking. It could be performed only in New York, and the general law above referred to shows that the rights of the parties are to be governed by its laws as the *lex loci*. Nor is the question a new one. In this court it has been declared as "too well established to require a reference to books." (*Everett v. Vendryes*, 19 N. Y. 436.) It was there distinctly presented. The action was by the indorser of a bill of exchange drawn in New Grenada upon a corporation in New York city. The indorsee sued the drawer of the draft. The drawer defended. He had been charged as drawer by reason of default of the drawee. He denied the indorsement by the payee. He also sought to amend his answer by setting up the law of New Grenada, under which he claimed the draft was not well indorsed. The decision of the court shows the difference between the rules applicable to the contract of the drawer and that of the indorser. Holding that the contract of the former was to be governed by the law of the place where it was to be performed, saying, "By drawing the bill the defendant undertook that the drawee in New York would pay it to the payee or his order, and if the drawee did not so pay it, he himself would make such payment." What payment? Why, the payment called for by the draft — a payment in New York. And such is the construction to be given to the defendants' contract here. The case also illustrates the principle above adverted to, that more than one law will apply to the same bill of exchange. Holding, as in *Lee v. Selleck* (*supra*), that the contract of the indorser would be governed by the law of New Grenada, where it was made. The drawee was held under the law of the place of performance, and the indorser under the place of contract. And this accords with well defined principles as stated in 2 Daniels' Negotiable Instruments, page 684, and avoids the inconsistency of the law in respect thereto, which the learned author deprecates. (*Id.* 685.) Other considerations lead to the same result. The check was written in Louisiana, but the engagement was consummated in this State. By its terms

it was necessary to present it to the drawee, and from that act and its consequences came the final obligation of the drawer. We are thus brought to examine the other or second class of facts, viz.: the things done in pursuance of the contract; for without them no cause of action had arisen against the drawer. (*Harker v. Anderson*, 21 Wend. 373.) The payee, then, must present the check, and if paid, the conditional obligation of the drawer is discharged. It was presented but not paid, and notice, according to the law merchant, was given to the drawer; not personally, or in New Orleans, but by depositing it in the post-office in New York. At that moment the cause of action arose, and the obligation of the defendant was perfect. (*Walker v. Bk. of the State of New York*, 9 N. Y. 582.) And this is so, although the drawer resided in one State, and the presentment and notice occurred in another. The holder might redraw for both interest and damages, or he might sue. In *Daniels* (*supra*, § 1213) the author says, where a bill is dishonored for non-acceptance a right of action accrues at once against the drawer. "It is plain where there was no need of acceptance the same result would follow non-payment." The learned author, in support of his dictum, cites *Robinson v. Ames* (20 Johns. 146). That was assumpsit against the drawers of a bill made by them in Georgia (where they lived) upon Townshend & White, merchants in New York city. And, being protested, notice was sent by mail, to the drawers, directed to them at their residence. It was not suggested that this was insufficient. Indeed, the rule is elementary, and the liability is one of the effects of the contract. There was, first, the right conferred on the payee; second, the duty of the drawer to fulfill it; third, the right of action which arises from the non-fulfillment of it. The first of these may be said to have happened in Louisiana at the moment when the check was delivered to the payee; the second could only happen in this State, and the third was consequent thereto. The learned counsel for the appellant says: "It is true the cause of action was complete upon notice," but contends that "notice did not occur here. Notice was given to the drawer, and he was in New Orleans; any notice given here would be absolutely worth-

less." In that view these proceedings against the drawer could only be taken in New Orleans ; or before action brought in this State, the drawer must actually receive the notice. It is, perhaps, enough to say that our preceding observation as to the nature of the drawer's contract and his duty of performance do not admit of either result. If the holder of a protested bill may at once sue or at once redraw (Story on Bills, 331), it is because a right attaches upon the concurrence of the above events, and I know of no authority, nor has any been cited, which entitles the drawer of a check to a moment's delay on the part of the holder. Having one dishonored obligation of the drawer he is not required to subject himself to further disappointment by calling upon him with another request, and in the language of PARKER, Ch. J., in *Shed v. Brett* (1 Pick. 411), "it may be asked 'who would take a bill or note remitted from New York if this doctrine be correct?' And if the parties liable be beyond sea, such instruments would be mere waste paper. If the bill should not be accepted, \* \* \* the unfortunate holder, with property belonging to the drawer \* \* \* before his eyes, must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself, without the power of arresting it. This cannot be sound doctrine." We conclude, therefore, that the cause of action in the case before us arose where the draft, by its terms, was payable, when payment was refused and notice given ; these things constitute a cause of action and it has arisen within this State. This construction of the words of the statute (§ 427) agrees with that given by the English courts to similar language in the statutes of that country. In *Durham v. Spence* (L. R., 6 Ex. Cas. 46), PIGOTT says : "What did the legislature mean when it spoke of the cause of action arising in England ? Did it mean what has been termed the whole cause of action ; that is, both the contract and the breach ? I think that is not the true construction. I understand by cause of action that which creates the necessity for bringing the action. No doubt to make the act or omission complained of a cause of action, a contract must have preceded ; but so also a negotiation must have

preceded the making of the contract. Yet, I should not include that negotiation, nor any of the other circumstances that might form part of the necessary evidence in the cause, as the ground work of the cause of complaint, but only the cause of complaint itself, that is the breach ; ” and adds, “ we are not justified in introducing into the statute a word not found there, and saying that where the legislature says cause of action it means whole cause of action, and not that which the words used naturally express ; the fact which gives rise to the action.” CLEASBY, B., says : “ The cause of action must have reference to some time as well as some place. Does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises ? I think it does. The cause of action arises when that is not done which ought to have been done ; or that is done which ought not to have been done. But the time when the cause of action arises determines, also, the place where it arises, for when that occurs which is the cause of action the place where it occurs is the place where the cause of action arises.” MARTIN, B., differed, but upon grounds not affecting our inquiry. To the same effect are many cases in our own courts, referred to by the General Term in its opinion and cited by the respondent here, and although, as the appellants say, these are not of binding authority, yet they express the opinion of very able and learned judges, and are, therefore, entitled to great respect. It is satisfactory to find that we are not called upon to decide differently. We think, therefore, that the action was well brought, and it follows that the plaintiff has a right to its enforcement in any manner prescribed by the law of this State.

The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local and affect nothing more than they can reach. For the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt, or right of action, as against a person in this



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State. The plaintiff as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit; a formality, and not matter of substance; a mere delusion. Once properly in court and accepted as a suitor, neither the law, nor, court administering the law, will admit any distinction between the citizen of its own State and that of another. Before the law and in its tribunals there can be no preference of one over the other. (*Abraham v. Plestoro*, 3 Wend. 548; *Johnson v. Hunt*, 23 id. 91; *Hoyt v. Thompson*, 5 N. Y. 351; *Merrick v. Van Santvoord*, 34 id. 217; *Blake v. Williams*, 6 Pick. 206.) The plaintiff, by the process of our courts, has acquired a right, of which no principle of national comity requires us to deprive it. It is said by Chancellor KENT, in *Holmes v. Remsen* (4 Johns. Ch. 470), to be "admitted in all the cases that every country may by positive law regulate as it pleases the disposition of personal property found within it, and may prefer its own attaching creditor to any foreign assignee, and no other authority has a right to question the determination;" and to the same effect are the observations of PLATT, J., in *Holmes v. Remsen* (20 Johns. 254); and so it has been held through various intermediate cases to that of *Kelly v. Crapo* (45 N. Y. 86), in which the late chief judge of this court regards the doctrine that a title acquired under foreign bankrupt or insolvent proceedings will not prevail against the rights of attaching creditors under the laws of the State, where the property is actually situated, so well settled, as to make it quite unnecessary to review the authority or the history of the decisions on that subject. The question, then regarded as too fully settled to be open for review, we see no reason to again discuss. That case, it is true, was reversed by the Supreme Court of the United States, but upon grounds not affecting the principle here involved. It follows that, however fatal the adjudication in Louisiana may be to the existence of the defendant corpora-

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tion in that State, it cannot deprive its creditors of the remedies afforded by other forums against its property. This action was commenced before the intervention of the commissioners, and to it they have established no defense, nor shown sufficient reason for defeating the priority of lien acquired by the proceedings therein. (*Willitts v. Waite*, 25 N. Y. 586; *Folger v. Columbian Ins. Co.*, 99 Mass. 267.) If the plaintiff has by its proceedings obtained an advantage against the law and adjudications of Louisiana, it is a resident of that State, and, as such, the appellants' counsel contends, may there be overhauled and made to account for what it has gained here. To that remedy, if it exist, the defendants may properly be remitted. The other points raised by the ingenious counsel for the appellants have been carefully considered by us, as have, also, the authorities cited in their support. The considerations already stated indicate that in our opinion they disclose no error in the decision of the court below, and that the judgment appealed from should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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JOHN COYNE, Assignee, etc., Respondent, v. FREDERICK G. WEAVER, late Sheriff, etc., Appellant.

Where two different constructions to an instrument are possible, one of which will uphold, the other render it void, the former is to be chosen. An assignment for the benefit of creditors contained a clause empowering the assignee to collect the "choses in action with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." In an action by the assignee to recover assigned property levied upon by defendant as sheriff by virtue of executions against the assignor, *held*, that the clause was to be construed as simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust required; that as so construed, the clause was not in conflict with the provision of the act of 1877, in relation to such assignments (§ 23, chap. 466, Laws of 1877), which permits the County Court to authorize an assignee to compromise any claim or

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debt belonging to the estate; and that it did not invalidate the assignment.

Also *held*, that evidence of the declarations of the assignor, made after the assignment, acceptance and delivery of possession under it, were properly excluded.

*Adams v. Davidson* (10 N. Y. 309), distinguished.

(Argued February 11, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 6, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought by plaintiff as assignee under a general assignment for the benefit of creditors, executed to him by James Doyle, to recover damages for the alleged taking and conversion of a portion of the assigned property. Defendant levied upon the property in question under and by virtue of certain executions issued to him as sheriff, against said Doyle.

The further material facts appear in the opinion.

*Edwin H. Risley* for appellant. The assignment is void upon its face, and conveyed no title to the property assigned as against the judgment creditor, power to do an unlawful act being given by it. (*Nicholson v. Leavitt*, 6 N. Y. 510; *Rapalje v. Stewart*, 27 id. 310, 317; *Townsend v. Stearns*, 32 id. 209-215.) Voluntary assignments are void where they in terms vested a discretionary power in the assignee, which, by the terms of the instrument, could be used as a shield or protection to the assignee for acts done under the same. (*Nicholson v. Leavitt*, 6 N. Y. 510; *Bright v. Tillinghast*, 13 id. 215; *Darwin v. Waterman*, 17 id. 9; *Nichols v. McEwen*, id. 22; *Jesup v. Hulse*, 21 id. 168, 170; *Kellogg v. Slauson*, 1 Kern. 302; *Townsend v. Stearns*, 32 N. Y. 209; *Benedict v. Huntington*, id. 219; *Connell v. Sherwood*, 19 Hun, 519, 524; 8 How. 468; *Matter of Ransom*, 1 Am. Insolvency Rep. 73.) When, therefore, under this assignment, the creditors ask an accounting, the assignee can justify any act of compounding a

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debt under it notwithstanding the statute, and it will be binding upon the creditor, as such proceedings are taken and had under the assignment. If the creditor does not wish to be bound by its provisions, he must contest it by proceedings in hostility to it. (*Bishop v. Hart*, 28 Vt. 71; *Merrill v. Englesby*, id. 15; Law of Trusts and Trustees [Bullard & Tiffany], 296, 398; *Ontario Bk. v. Root*, 3 Paige, 478; *Mills v. Argall*, 6 id. 577; *Ames v. Blunt*, 5 id. 13.)

*Nicholas E. Kernan* for respondent. Power, given to an assignee, to "compound, compromise and settle claims and things assigned, in his discretion," does not vitiate the assignment. (*Bellows v. Partridge*, 19 Barb. 176; *Bishop on Insolvent Debtors* [1879], § 214; *Evans v. Doyle*, 1 April Gen. Term, 1879 [4th Depart.]; *Gunther v. Richmond, Sher.*, 18 Hun, 331.) Where the language of a general assignment can be abundantly satisfied by a construction which will support the instrument, such construction will be adopted. To render the assignment void, the language must not only admit of a construction consistent with a fraudulent intent, but it must be inconsistent with an honest purpose and a lawful act. (*Townsend v. Stearns*, 32 N. Y. 209; *Benedict v. Huntington*, id. 219; *Kellogg v. Sturson*, 1 Kern. 302; *Mann v. Whitbeck, Sher.*, 17 Barb. 388; *Bk. of Silver Creek v. Talcott*, 22 id. 550, 561; *Jewett v. Woodward*, 1 Ed. Ch. 195, 197; *Brainard v. Dunning*, 30 N. Y. 211, 215; *Van Dine v. Willett*, 38 Barb. 319; *Reed v. Worthington*, 9 Bosw. 617; *Whiting v. Krows*, 11 Barb. 198, 204; *Wilson v. Robertson*, 21 N. Y. 587; *Campbell v. Woodworth*, 24 id. 304; *Boese v. King*, 78 id. 471.) Power to "compromise such of the debts assigned as are doubtful by receiving a part for the whole" is valid, and furnishes no implication of a fraudulent intent. (*Brigham v. Tillinghast*, 15 Barb. 618; reversed, 13 N. Y. 215; *Dow v. Platner*, 16 id. 9, 15; *Jessup v. Hulse*, 21 id. 169; *Benedict v. Huntington*, 32 id. 225.) Under the authorities, it is the natural and common sense construction of the clause in question, that the assignee is invested with a discretion to be lawfully exer-

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cised. (1 Perry on Trusts, § 440; Tiffany & Bullard's Law of Trusts, 592, 593, 616; *King v. Talbott*, 40 N. Y. 76, 78, 83; *Ackerman v. Emmett*, 4 Barb. 626, 645; *Jacobs v. Allen*, 18 id. 549.) As matter of law, the assignee would have the power to do precisely what this assignment authorizes him to do. (*Chouteau v. Suydam*, 21 N. Y. 179, 182; *Anonymous v. Gelpecke*, 5 How. 246; Bishop on Insolvent Debtors [1879], 273; *Litchfield v. White*, 7 N. Y. 438, 443; 2 Perry on Trusts, § 482; *Pierson et al. v. Thomson et al.*, 1 Ed. Ch. 212, 222-225; Lewin on Trusts, marg. p. 520; *Blue v. Marshall*, 3 P. Wms. 381; *Jermain v. Patterson*, 46 Barb. 9.) Section 23, chapter 466, Laws of 1877, in no wise affects this question. (*Chouteau v. Suydam*, 21 N. Y. 184; 5 Hun, 251; 1 Abb. 274; 3 Barb. Ch. 642; *Gunther v. Richmond*, 18 Hun, 232.) No demand was necessary, since the appellant took the stock directly from the respondent. (*Pierce v. Van Dyke*, 6 Hill, 613; *Bliss v. Cottle*, 32 Barb. 322.)

FINCH, J. The plaintiff claims under a general assignment for the benefit of creditors, which the defendant insists is void on its face by reason of an unlawful authority conferred upon the assignee. The instrument contains a general grant and conveyance of all the property and choses in action of the assignor, and empowers the assignee "to sell and dispose of the said real and personal estate, and to collect the said choses in action, with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." A literal and rigid construction of this language would justify the claim of the appellant that authority was given to compromise all debts due the assignor, as well those which were good for their entire amount, as those which were doubtful and precarious. If we were compelled to accept this interpretation, it would be our duty to declare the instrument void, for it would be an authority to waste the fund. But we are satisfied that it is not our duty to adopt this construction. It is difficult to conceive of any fraudulent motive or purpose on the part of the assignor which would be aided by such an authority. The con-

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sequent loss would be injurious to the assignor, and in no possible respect an advantage. The waste permitted would tend only to increase the balance of uncanceled debt remaining to hamper his action after the close of the trust. As sought to be construed it is literally an authority to waste the assets devoted by the assignor to the payment of his debts. Acted upon, it could only injure both the creditors and the assignor and by no possibility benefit either. We should not accept such an interpretation unless compelled by plain and inflexible provisions. Two rules should guide us to the proper result. The meaning and intention of the assignor is to be gathered from the whole instrument, and where two different constructions are possible, that is to be chosen which upholds and does not destroy the instrument. (*Townsend v. Stearns*, 32 N. Y. 209; *Brainerd v. Dunning*, 30 id. 211; *Campbell v. Woodworth*, 24 id. 304; *Benedict v. Huntington*, 32 id. 219.) It must be granted that the authority to compromise, given by the clause under consideration, relates by its terms to the choses in action generally transferred to the assignee. So far no distinction is made between the good and the doubtful assets. But the important words "where he shall deem it expedient to do so" qualify the general authority and limit it to either one or the other of two possible cases, according to our choice of one or the other of two possible constructions. Those qualifying words may mean, either that the assignee is at liberty to compromise any claim if he shall choose to do so, and behind his judgment nobody shall go, or that the assignee may compromise such claims as in the exercise of a sound discretion the interests of the trust require. We think the latter is the plain and proper construction. If it was necessary, in order to reach that interpretation, to be subtle and astute in our study of the language used, the quaint expression of Lord HOBART, cited with approval in *Townsend v. Stearns* (32 N. Y. 215), would furnish our justification. A court may wrestle, if need be, with unwilling words to find the truth, or preserve a right which is endangered. But any strain upon the language of the assignment is not necessary to our conclusion. We may

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so test the final and important phrase as to be certain of its meaning. Let us suppose that the assignee, acting under the authority we are discussing, had compromised a debt due the assignor by accepting one-half its amount, in a case where the debtor was perfectly good, and the whole sum could have been collected. Let us further suppose that on his accounting, the assignee admitting all these facts, gave no other explanation than to plant himself upon the words of his authority, and declared that he was empowered to compromise where he deemed it expedient, and he did deem the compromise in question expedient, and, therefore, was entitled to protection. Is it to be presumed that any court would accept his construction of the authority conferred? The just and proper answer would be that he overestimated and misconstrued his power; that while he was given a discretion, it was the discretion of a trustee, exercised in a proper case, under circumstances requiring it, and founded upon a just consideration of the needs of the fund committed to his care. The clause in question, therefore, must be held to have given to the assignee no arbitrary power to compromise where such action was neither necessary nor proper; but merely the discretion which the law recognizes, to compromise doubtful and dangerous debts, in cases where the safety and interest of the fund demands such action; and that in such case only can he honestly "deem" a compromise "expedient," or be allowed to plead that authority as a protection. Thus understood, the language of the assignment is not open to the criticism bestowed upon it. It confers upon the assignee no unlawful or arbitrary power, and takes away from the creditors no just protection. It leaves the assignee liable for his negligence or misconduct if he makes a compromise where prudence or necessity do not require it, and the assignment, therefore, is not void. (*Dow v. Platner*, 16 N. Y. 562; *King v. Talbot*, 40 id. 76; *Chouteau v. Suydam*, 21 id. 179; *Ginther v. Richmond*, 18 Hun, 234.) In the case last cited the same question of interpretation was discussed and a conclusion reached in accordance with the views we have expressed. The learned judge who wrote the opinion in that

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case very properly calls attention to the language of the act of 1877, which permits the County Court to "authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor," and argues that the phrase "any claim" could not be interpreted to mean that the court might authorize a compromise of a good debt due from a solvent debtor, and yet that such a construction would be quite as reasonable as that sought to be put upon the similar language of the assignment.

We do not think the recent legislation, relating to general assignments for the benefit of creditors, affects our conclusion. (Laws of 1877, chap. 466, § 23.) Before that enactment the assignee could always apply to the court for its advice on a question of compromise. (*In re Croton Ins. Co.*, 3 Barb. Ch. 642; *Anonymous v. Gelpcke*, 5 Hun, 251.) The act of 1877, in this respect, is merely cumulative, and extends to the County Court an authority in the given case necessary to the complete exercise of its jurisdiction. Nothing in the assignment, as we interpret it, in any manner conflicts with the authority conferred by this statute on the County Court.

It is further objected that the judge erred upon the trial in excluding the declarations of Doyle, the assignor. The sheriff made his first levy upon the stock of goods on January 16th. Doyle was then in the store. The assignment to plaintiff was made and accepted on the 2d day of January, and the inventory was made within two or three days thereafter. The assignee took immediate possession, and did not employ Doyle, in any capacity, in the store. The defendant's answer alleges that the assignee was in possession when the levy was made. On this state of facts the defendant's counsel asked the question, "at the time you made the first levy, what did Doyle say on the subject of having sold goods from the store prior to the levy?" The question was excluded, and the defendant excepted. A further offer was made to prove similar declarations. They were inadmissible because made after the assignment and delivery of possession under it. (*Cuyler v. McCartney*, 40 N. Y. 221; *Tilson v. Terwilliger*, 56 N. Y. 273.) This was not



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a case like that in *Adams v. Davidson* (10 N. Y. 309), where an assignor continued in possession without a break, notwithstanding a real or pretended sale.

We are of opinion, therefore, that no error was committed on the trial, and the judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

WILLIAM GRAHAM et al., Appellants, v. THE FIRST NATIONAL BANK OF NORFOLK et al., Respondents.

Where a married woman is the owner of stock, of a bank located in a State other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile..

E., a married woman domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter State the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the controlling agent; with these banks the Virginia bank had accounts kept in the name of the husband as cashier; by his direction or with his assent various dividends declared upon said shares of stock were paid to said banks or credited in their accounts and allowed them on settlement. In an action by assignees of the wife to recover the dividends, *held*, that the evidence justified a finding of payment of the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability..

(Argued February 11, 1881; decided March 1, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 8, 1880, which affirmed a judgment in favor of defendants, entered upon the report of a referee. (Reported below, 20 Hun, 325.)

This action was brought by plaintiffs, as assignees of Eliza A. Graham, to recover certain dividends declared by defendant,

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The First National Bank of Norfolk, on shares of its stock standing in the name of said assignor. The defense was payment.

The following facts among others were found by the referee.

Said defendant was organized under the National Banking Act and was located and doing business at Norfolk, Virginia. At its organization, and prior to January, 1865, one James Graham subscribed and paid for (whether by and out of the funds of Mrs. Eliza A. Graham, his wife, does not appear) one hundred and ninety-six shares of the capital stock of said bank, and directed the certificate thereof to be issued in the name of Mrs. Eliza A. Graham, his wife. On or about June 8, 1865, the certificate of said shares was, by the direction of said James Graham, delivered to the plaintiffs as security for a loan then and there made by them to said James Graham; but said shares were never transferred to the plaintiffs on the books of said bank, nor does it appear that said bank ever had any notice of such pledging, or delivery of said stock to the plaintiffs, nor does it appear that said certificate was ever assigned in writing to the plaintiffs, or that the power of attorney and assignment printed on the back (which was the usual form) was ever signed or executed by said Eliza A. Graham, or by said James Graham. Plaintiffs held (as aforesaid) said certificate and stock from June 8, 1865, until on or about September 5, 1866, at which last-named date it was delivered to said bank, and became its property. While the plaintiffs held said certificate as above-mentioned, said bank declared three dividends, as follows: On or about January 1, 1866, a dividend of ten per cent; on or about April 1, 1866, a dividend of thirty per cent; on or about July 1, 1866, a dividend of five per cent. Said bank paid said thirty per cent, in cash to James Graham. The dividend of ten per cent and the one of five per cent were, by the direction, or with the approval of said James Graham, credited on an account of 'James Graham, cashier,' and went to reduce and pay an indebtedness which the Farmers and Merchants' Bank of Elkton, Maryland, or the Elkton National Bank, owed said

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First National Bank of Norfolk, Virginia. Said James Graham and his wife, at the times in question, were domiciled in, and residents of, the State of Maryland, by the laws of which State a married woman has the right to the sole and separate use and control of her property. At said times the common law of England prevailed in Virginia, by which law the husband could lawfully reduce to possession during his lifetime the choses in action of his wife, and receive, receipt for, discharge, and acquit for the same. On September 24, 1866, Mrs. Graham, at the request of the plaintiffs, and without any consideration being paid to her, executed an instrument in writing, by its terms assigning to them all claims against defendant, The First National Bank.

*Malcolm Campbell* for appellants. The mere entry of a credit on the books of the First National Bank of Norfolk, in favor of the Elkton National Bank, cannot, under any recognized rule of law, be regarded as a payment, either to Eliza A. Graham or her husband, of the dividends in question. (*Wateroliet Bk. v. White*, 1 Den. 608; *Highland Bk. v. Dubois*, 5 id. 558; *Beckwith v. Union Bk.*, 9 N. Y. 211.) National banks cannot acquire a lien on their own stock held by persons who are their debtors, even by provisions to that effect in their own articles and by-laws. (*Bullard v. The Bank*, 18 Wall. 589; *Bank v. Lanier*, 11 id. 369.) The same principle prevents their acquiring a lien on the dividends. (*Ehle v. Chittenango Bk.*, 24 N. Y. 548.) The assignment of claim by Mrs. Graham to the plaintiffs was a perfectly valid transfer by the law of her domicile. (*Barton v. Barton*, 32 Md. 214; *Whitridge v. Barry*, 42 id. 40; *Trader v. Lowe*, 45 id. 1; *Barry v. Equit. Life Ass. Society*, 59 N. Y. 587; *Stoneman v. Erie R. R. Co.*, 52 id. 429.) To sustain the plea of payment, even if actual payment had been proved, it was necessary for the defendants to show that such payment was made in good faith, and without notice of the plaintiffs' rights as the actual holders of the stock. (*McNeil v. Tenth National Bk.*, 46 N. Y. 332.) The law of Maryland, the domicile of James

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Graham and his wife, is the law properly applicable to this case, and under that law payment to the husband would not be binding on the wife. (Wharton on Conflict of Laws, §§ 118, 121, 331a; *Le Breton v. Miles*, 8 Paige, 261; *Parsons v. Lyman*, 20 N. Y. 112; *Hoyt v. Commissioners of Taxes*, 23 id. 224; *Bonati v. Welsch*, 24 id. 151; *Hill v. Pine River Bk.*, 45 N. H. 300; *Peterson v. Chemical Bk.*, 32 N. Y. 21; *Lee v. Selleck*, 33 id. 657; *Loney v. Penniman*, 43 Md. 130; *Slaybacker v. Bk. of Gettysburg*, 10 Penn. St. 373.) Even the exercise of control by him over the stock does not amount to a reduction to possession of the dividends, and such reduction must be actual, not constructive. (*Harcum v. Hadnall*, 14 Gratt. 382, 383; *Searing v. Searing*, 9 Exch. 283.)

*Francis C. Barlow* for respondents. When the dividends were declared, a contract arose to pay them to the person legally entitled to receive them, which was made in Virginia, and was performed there. (*Scott v. R. R. Co.*, 52 Barb. 45, 69; *Hager v. Union Nat. Bank*, 63 Me. 509, 512, 513; *King v. R. R. Co.*, 5 Dutch. [N. J.] 504; *State v. R. R. Co.*, 6 Gill, 363, 387; *Phila. R. R. Co. v. Hickman*, 28 Penn. St. 329; Story on Confl. of Laws, §§ 347, 361; *Bank of Washington v. Triplett*, 1 Pet. 25, 34; *Bowen v. Newell*, 13 N. Y. 290.) A defense or discharge, good by the law of the place where the contract is made or to be performed, is to be held of equal validity in every other place where the question may come to be litigated. (Story on Confl. of Laws, §§ 331, 332; 2 Kent's Com. [12th ed.] 459; *Harrison v. Edwards*, 12 Vt. 648; *Hicks v. Brown*, 12 Johns. 142.) In respect to acts done in any country, the capacity or incapacity of the person is to be determined by the laws of that country. (*Miliken v. Pratt*, 125 Mass. 374; 2 Pars. on Cont. [6th ed.] 573, 575, note; 2 Kent's Com. 458, 459; *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 190; *Polydore v. Prince*, 1 Ware, 410, 417, 418, 419; *Huey's Appeal*, 1 Grant's Penn. Cas. 51; *Pearl v. Hansborough*, 9 Hemp. [Tenn.] 426.) The transfer of the certificate of stock did not carry the three dividends in

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question, which had been previously declared. *Leroy v. Globe Ins. Co.*, 2 Ed. Ch. 651, 670, 671; *King v. R. R. Co.*, 5 Dutch. [N. J.] 504, 505, 506.) The assignment by Mrs. Graham, on September 24, 1866, was inoperative, because her husband did not join in it. (*Schindel v. Schindel*, 12 Md. 294, 312, 313, 521, 524; *Hall v. Eccleston*, 37 id. 519; *Whittridge v. Barry*, 42 id. 152.) Our married women's acts only apply to women who are married in or are resident in this State. (*Savage v. O'Neill*, 42 Barb. 374; *Ritchings v. Waldron*, 3 Daly, 288, 293.) A suit for dividends only lies upon a previous demand, and such demand must be made at the office of the corporation. (*Scott v. R. R. Co.*, 52 Barb. 45, 69; *Hager v. Union Nat. Bank*, 63 Me. 509, 512, 513; *King v. Paterson R. R. Co.*, 5 Dutch. [N. J.] 504; *State v. R. R. Co.*, 6 Gill, 363, 367; *Phila. R. R. Co. v. Hickman*, 28 Penn. St. 320.) Declarations of an agent do not bind the principal, unless they are a part of the *res gestæ*. (*Baptist Church v. Ins. Co.*, 23 How. 458, 450; *S. C.*, 28 N. Y. 153-160; *Luby v. R. R. Co.*, 14 id. 131-133; *Card v. R. R. Co.*, 50 Barb. 44; *Bank v. Stewart*, 37 Me. 519.) The collecting of dividends on stock is a reducing to possession of the dividends, though not of the stock. (*Burr v. Sherwood*, 3 Brad. 85; *Hart, Admr. of Ann Hart, v. Stephens*, 6 Ad. & Ell. [N. S.] 937.) An assignment of a chose in action for a valuable consideration is as much a reduction to possession of it as receiving payment of it. (*Westervelt v. Gregg*, 12 N. Y. 205; 2 Atk. 207, 208; Schouler's Dom. Rel. 121; 2 Kent [12th ed.], 135.) James Graham had a right to collect these dividends, and his declaration that he had received them would be admissible, just as his written receipt would be. (*Van Keuren v. Calkins*, 66 N. Y. 81; *Woodruff v. Cook*, 25 Barb. 505.)

FINCH, J. The ownership of one hundred and ninety-six shares of stock, which stood upon the books of the Norfolk Bank, in the name of Eliza A. Graham, must be deemed vested in her, whether the purchase-price was paid by her or by her husband, and notwithstanding the evident control of it, for his own pur-

poses, by the latter. No creditors of the husband intervene to affect the question, and, as between Mrs. Graham and the bank, her right as owner must be admitted. The dividends declared during such ownership belonged to and were payable to her; and, assuming for the present that her assignment to plaintiffs was effective to transfer such right to them, there remain for discussion only the two questions: whether the Norfolk Bank did, in fact, pay the dividends sued for to the husband of Mrs. Graham; and whether, by such payment to him, the liability of the bank to her was discharged. The referee has found that such payments were, in fact, made to James Graham, the husband. At the time of these transactions he appears to have been the cashier of the Elkton National Bank, and of the Farmers and Merchants' Bank, of Elkton, in both of which he was largely interested, and the principal and controlling agent, and both of which banks were situate in the State of Maryland, in which State he and his wife resided. The evidence tends to prove that the dividends in question were, in fact, paid to James Graham, cashier, and, therefore, to the Elkton or Farmers and Merchants' Bank. Two of the dividends are proved to have been so paid, with his assent and by his direction given at the time, and one of them with his subsequent approval and ratification. The larger dividend of the three was paid by the delivery, to the Elkton Bank, of the amount in its own bills, and the others by a credit of their respective sums to Graham, as cashier. While it is claimed that, at the date of these credits, there was nothing due from the Elkton Bank to the Bank of Norfolk, and, therefore, no debt upon which the credit could apply, it is yet uncertain, upon the evidence, how the accounts actually stood, and the credit to Graham, as cashier, by his direction, or with his assent and approval, at a time when he conceded the existence of a large indebtedness which he was interested to reduce, was a good payment to him, and an application of the debt of the bank to his wife to the liability of one or both of the Elkton banks, upon which the respective parties appear to have acted by a settlement between the banks, and the benefit of which, as

against the Elkton banks, Graham must be presumed to have had. While the facts are not free from difficulty, a careful examination has satisfied us that there was sufficient evidence to warrant the finding of the referee, and to make it conclusive on this appeal.

The question of law, however, remains, whether the payment by the bank to James Graham was a good payment to his wife in whose name the stock stood upon the books of the bank. The Norfolk Bank was located and transacted business in the State of Virginia. It is proved that in that State the common law prevails as it respects the relation of husband and wife, and that within that jurisdiction the husband has the absolute right to reduce to his own possession, and use for his own benefit, the personal property of the wife. The contract out of which grew the right to the dividends was both made and to be performed in Virginia, and if the payment by the Bank of Norfolk to James Graham is to be tested and measured by the law of that State, it is conceded to have been good and an effective discharge of the liability to the wife. It is denied, however, that the law of Virginia applies, and it is argued that the law of Maryland, the *lex domicilii*, governs and controls the capacity of the parties to receive payment, and the duty of the bank in making it. The general subject of a conflict between the law of the domicile and that of the place of contract has been fully discussed by Story and Wharton in their respective treatises. (Story on Conflict of Laws, § 374 *et seq.*; Wharton, § 393, etc.) Whatever is useful in the learning of the continental jurists, or the decisions of the English courts, has been made tributary to conclusions which we may safely follow where, at least, they are in harmony with the ruling of our own tribunals. It must, then, be granted that movables or personal property, by a fiction of the law, are deemed attached to the person of the owner, and so, present at his domicile, whatever their actual situation may be. The law of the domicile, therefore, naturally governs their transfer by the owner, and their disposition and distribution in case of his death. So far the authorities substantially agree, differing only in the reasons upon which the rule is founded, and by

which it is to be justified. When, however, the question passes beyond the disposition of the personal property by the party, or the act of the law, within the jurisdiction of the domicile, and busies itself with the inherent character of the property, and of the contracts which both create and constitute it, elements of discord arise, and the authorities are not easily to be reconciled. It is readily seen that the inherent character of the contract must usually be the product of the jurisdiction in which it originates, and hence it follows, and has been justly held, that the construction, nature and effect of a contract are to be determined by the *lex loci contractus*. (Story on Conflict of Laws, § 321.) But no such question is here. There is no dispute about the construction of the contract to pay dividends. All are agreed upon that. There is no trouble as to the nature of the contract or its effect. Its validity, and the duty of payment to the stockholders, is conceded on all sides. The real question is over the performance of the contract, or its discharge by payment; and that involves the capacity of the husband to receive and discharge the debt, represented by the dividends, *jure mariti*. On the one hand it is argued that this question of capacity, of the rights and powers flowing from the marriage relation, is dependent upon the law of the domicile, and utterly unaffected by the foreign law, and the former must, therefore, dictate and measure the authority and power of the husband and the right of the wife. That is, in general, true as between themselves, and relatively to each other. It does not follow that it is true as between them and a debtor in another State, whose contract was made there, and is there to be performed. Such a fact introduces a new element into the problem. It would scarcely be endurable if a railroad or insurance company declaring dividends in this State should be bound to pay stockholders in other States according to the foreign laws, and in accordance with different and varying codes. Observing the evil result we must remember that, in a case like the present, it is a legal fiction which attaches the property to the domicile, and the actual fact may be otherwise. Judge Comstock, in *Hoyt v. The*



*Commissioners of Taxes* (23 N. Y. 228), well says, "that the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions it has its special uses. It may be resorted to when conveniencê and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action." And Judge STORY says that the legal fiction "yields whenever it is necessary for the purposes of justice, that the actual *situs* of the thing should be examined." (Conf. of Laws, § 550.) And hence has been very steadily sustained the general rule that a contract made in one State and to be performed there is governed by the law of that State, and the further rule, which is a logical result, that a defense or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere. (Story on Conf. of Laws, §. 331; *Thompson v. Ketcham*, 8 Johns. 189; *Bartsch v. Atwater*, 1 Conn. 409; *Smith v. Smith*, 2 Johns. 235; *Hicks v. Brown*, 12 id. 142; *Sherrill v. Hopkins*, 1 Cow. 103; *Peck v. Hibbard*, 26 Vt. 702; *Bowen v. Newell*, 13 N. Y. 290; *Cutler v. Wright*, 22 id. 472; *Waldron v. Ritchings*, 3 Daly, 288; *Jewell v. Wright*, 30 N. Y. 259; *Willits v. Waite*, 25 id. 577.) In these cases the fiction yields to the fact; the *situs* attached theoretically to the person of the owner, and, therefore, to his domicile surrenders to the actual *situs* where justice and convenience demand it. The illustrations are various, but founded upon a common reason and justification. For the purpose of taxation the actual *situs* controls and the fiction which carries the personal property to the domicile of the owner is disregarded. As to days of grace affecting the maturity of a contract and determining when it becomes due, the *lex loci* is applied. The defense of infancy is to be sustained or denied according to the rule of the place of contract and performance. So, also, as to the disability of coverture, and the rate and legality of interest. And even an assignment, *in invitum*, compelled by the local law, will transfer property in another State where suitors in the courts of the latter are not thereby prejudiced. These rulings and others of the like character have been modified and moulded in their

application by the influence of varied circumstances, but concur in the general principle upon which the *lex loci* has been applied. The point pressed here is that while it controls the construction and validity of the contract it does not settle the capacity of the non-resident parties. But to found a ruling upon such a test would involve us in an ambiguity. Capacity may affect the power of transfer and the direction and details of distribution. In that respect it is often shaped and settled by the law of the domicile. But it also affects the validity of a contract and the mode and manner of its dissolution or discharge. In that respect it is generally governed by the law of the place of contract. Story concludes, after a full and learned review of the insuperable difficulties which attend an effort to extend the capacity or incapacity created by the law of the place of domicile to foreign States, that the true rule is that "the capacity, state and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired and contracts made in the place of their domicile, touching property situate therein," but as to acts done, etc., elsewhere the *lex loci contractus* will govern in respect to capacity and condition. We cannot make, therefore, the law of the domicile in and of itself a solvent of the doubts and difficulties likely to arise even as to questions of capacity. In the present case the contract was made in Virginia and to be performed there. The dividends were there declared and payable. They were paid to the husband who could lawfully receive and appropriate them, by the law of Virginia, to his own use and benefit. The payment was, therefore, valid and effectual and discharged the bank from its liability. The rights of the wife after such payment, as between herself and her husband under the law of Maryland, might prove to be a very different question. It is sufficient for the purposes of this case that the payment, which the referee finds was in fact made to the husband, discharged the liability of the bank and furnished a defense to the action.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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Statement of case.

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THE TOWN OF SPRINGPORT, Respondent, v. THE TEUTONIA SAVINGS BANK et al., Appellants.

THE SAME, Respondent, v. THE GERMAN UPTOWN SAVINGS BANK et al., Appellants.

THE SAME, Respondent, v. THE FRANKLIN SAVINGS BANK, Appellant.

In actions brought to restrain defendants from transferring, and to compel the cancellation of bonds issued by plaintiff under the act of 1869 (chap. 314, Laws of 1869), authorizing it to subscribe for stock of the C. L. R. R. Co., it appeared that revocations of consents of tax payers of the town, executed and acknowledged with the same formalities as the consents, were delivered to the assessors while they had the consents before them, and before they had acted upon them, and that the residue were insufficient to constitute the majority required by the statute; also that the assessors disregarded the revocations and wrongfully made and filed the statutory affidavit. *Held*, that the omission to file the revocations did not render them ineffectual; that their delivery made them effectual and withdrew from the assessors the authority to make the affidavit.

Also, *held*, that such omission did not estop the plaintiff; that, assuming the tax payers, who signed consents and then revoked them, could be estopped by their acts or omissions, they could not estop the whole body of tax payers.

Also, *held*, that a tender before the commencement of the action, of the stock received for the bonds was not necessary; that defendants could not require a tender to themselves, as they were not received from them and they had no title thereto. If they had any right to them (as to which *quære*), all they could claim was an equitable right of subrogation on cancelling their bonds; if the claim was that the stock should have been surrendered to the company or canceled, that was a matter between it and plaintiff, and the rights of the latter as against defendants did not depend upon the prior adjustment of the matter.

*It seems* that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received.

Also, *held*, that the affidavit of the assessors was not conclusive, but only *prima facie* evidence of the facts therein stated.

(Argued February 8, 1881; decided March 8, 1881.)

## Statement of case.

THESE were appeals from judgments of the General Term of the Supreme Court, in the fourth judicial department, entered upon orders made August 17, 1880, modifying by striking out allowances for costs, and affirming, as modified, judgment, entered on reports of a referee.

These actions were brought to have certain bonds, issued by plaintiff to pay for subscriptions for stock of the Cayuga Lake Railroad, authorized by chapter 314, Laws of 1869, as amended by chapter 152, Laws of 1870, delivered up and canceled, and to restrain defendants from transferring them.

It is reported on a former appeal in 75 N. Y. 398.

The referee found in substance in each case that a majority of the tax payers of the town of Springport, owning more than one-half of the taxable property of the town, duly executed and acknowledged consents in writing that the commissioners for said town, appointed under said act, might borrow, on the credit of the town, \$100,000, and issue its bonds for the purposes of the act; that after the presentation of the consents to the assessors and before they met to act thereon, revocations in writing, signed by certain of the tax payers who had signed the consents, and executed and acknowledged in the same manner as the consents, were delivered to the assessors; but that the assessors, being of the opinion that, under the statute, they were not authorized to take cognizance of said revocations, without regard to them, made their affidavit required by statute to authorize the issue of bonds, and filed the same with the consents in the town clerk's office, and that they were filed in the office of the county clerk, but that said revocations were not filed; that rejecting the tax payers who signed said revocations, there was not a consent in writing of a majority of the tax payers of the town owning more than one-half of the property assessed; that the railroad commissioners of the town issued \$100,000 of bonds to the railroad company, receiving in exchange that amount of stock, which bonds were purchased by defendants in good faith and for value; that plaintiff demanded a return of the bonds, but did not offer to surrender or transfer the stock.

## Statement of case.

*Jno. E. Parsons* for appellant. There was no complete revocation of the consents. (*People ex rel. Yawger v. Allen*, 52 N. Y. 538; *Howland v. Eldridge*, 43 id. 457.) A partnership as between partners may be dissolved, and yet either partner has a continuing right as to strangers to bind his co-partners. (*Wardwell v. Haight*, 2 Barb. 549; *Van Eps v. Dillaye*, 6 id. 244; *City Bk. of Brooklyn v. McChesney*, 20 N. Y. 240.) The authority of an agent may be revoked as between him and his principal, and yet the principal be bound by the agent's subsequent acts in favor of third persons. (*Farmers and Mechanics' Bk. v. Stickney*, 8 L. R. 161; *Lefler v. Field*, 50 Barb. 407; *Edwards v. Shafer*, 49 id. 291, *Morey v. Webb*, 58 N. Y. 350; *Beard v. Kirk*, 11 N. H. 397; *Fellows v. Hartford & N. Y. S. Co.*, 38 Conn. 197; *Story's Eq.*, § 470 *et seq.*) It was necessary that the revocation should be filed. (*Town of Venice v. Woodruff*, 62 N. Y. 462.)

*George W. Wingate* for receiver appellant. A tax payer who had once given his consent had no further right in the matter. (*People v. Mitchell*, 35 N. Y. 555.) There is no remedy provided for the correction of errors into which the assessors may fall in respect to matters referred to their determination. (*Howland v. Eldridge*, 43 N. Y. 457.) Although the authority of an agent, as between himself and his principal, be revoked, yet the latter is bound by the agent's subsequent acts in favor of third parties, who have not been notified of such revocation. (*Farmers and Mechanics' Bank v. Stickney*, 8 Law, 161; *Story's Equity*, § 470 *et seq.*; *Storey v. Webb*, 58 N. Y. 350; *Lefler v. Field*, 50 Barb. 407; *Edwards v. Schaffer*, 49 id. 291.) The failure of the town to tender to the defendants the stock for which these bonds were issued is a bar to the prosecution of the action. (*Story's Equity Jur.*, §§ 1520-1524; *Tripp v. Cook*, 26 Wend. 143, 160; *Smedberg v. More*, id. 238, 247; *Hazel v. Dunham*, 1 Hall, 655, 658; *Browne v. Howe*, 2 Barb. 586, 595; *Taylor v. Fleet*, 4 id. 95, 103; *Bench v. Sheldon*, 14 id. 66, 71; *Munn v. Worrall*, 16 id. 509, 583; *Greenleaf v. Mumford*, 19 Abb. Pr. 469, 476; *Stanley v. Gadsby*, 10 Pet. 521.)

*W. F. Cogswell* for respondent. The affidavit of the assessors is not conclusive evidence of the fact that a majority of the tax payers have given their consent to mortgage the town. (*People ex rel. Martin v. Brown*, 55 N. Y. 180; *Horton v. The Town of Thompson*, 71 id. 513; *This Plaintiff v. These Defendants*, 75 N. H. 397-406; *The People v. Bachullor*, 53 N. Y. 128.) The revocations should have been deducted from the consents by the assessors, in determinating the question whether the requisite number of consents had been procured. (*People ex rel. Yawger v. Allen*, 52 N. Y. 538; 75 id. 397.) The claim of the defendants that the plaintiff cannot succeed because it did not tender the stock issued by the railroad company to the commissioners at or before the commencement of the action is untenable. (*Weisner v. Village of Douglas*, 64 N. Y. 91; 75 id. 397-407; *Schermerhorn v. Talman*, 14 id. 93, 129, 142.) The certificate was never any thing but evidence of the ownership of a proportionate part of the property and franchises of the company. (*Arnold v. Rugles*, 1 R. I. 105; Angell on Corporations, § 562.) The railroad commissioners are not the town, or even officers of the town, and their acts or omission to act in no way affected it. (*Horton v. Thompson*, 71 N. Y. 513.)

RAPALLO, J. The only points raised on the present appeal which were not expressly passed upon on the former appeal (75 N. Y. 397) are: that the revocations of the consents of the tax payers of the town were ineffectual because not filed in the office either of the town or county clerk, and that there was no tender of the stock which had been issued by the railroad company, or of the cancelment of that stock, and no offer either to cancel or surrender that stock when the demand was made for the surrender of the bonds. The objection that the revocations were not filed is untenable. They were executed and acknowledged with the same formalities as the consents, and delivered to the assessors while those officers had the consents before them and before they had acted upon them or passed upon their sufficiency. Their effect was to annul the consents

revoked, and the residue being insufficient to constitute the majority required by the statute, the assessors wrongfully made and filed the affidavit, and the condition upon which the power of the railroad commissioners to issue the bonds wholly depended, was not complied with. That condition was the consent of the requisite majority of the tax payers and not merely the making of the affidavit. The revocations were complete when delivered, to the assessors, before they had acted upon the consents. The consents had not been filed when the revocations were delivered, and the filing of the consents after such revocation of them was wrongful. The delivery of the revocations to the assessors was the proper mode of making them effectual, and not the filing of them with the town or county clerk. Their effect was to withdraw from the assessors the authority to make the statutory affidavit and to file it with the consents, thus revoked. On this very ground the proceedings of the assessors in making and filing the affidavit and consents, in disregard of the revocations, were adjudged void and set aside by this court on *certiorari* in the case of *People ex rel. Yauger v. Allen et al. Assessors et al.* (52 N. Y. 538). The filing of the revocations was not necessary to render them effectual.

The appellants insist, however, that inasmuch as the consents were directed by law to be filed, and they were filed, the revocations ought also to have been filed, so as to give notice to parties who might rely upon the consents on file, that they had been revoked; and the omission to file such revocations is relied upon as some sort of estoppel. There is no evidence in this case that any one acted on the faith of the consents on file, but aside from that, the difficulty is that the filing of the affidavit and consents was wholly unauthorized, and the proceeding void; that the tax payers who gave the consents originally and then revoked them are not the only persons now contesting the validity of the proceeding and of the bonds, nor do they represent all the contestants. Assuming that they could, by their acts or omissions, estop themselves, they could not estop the others. The real contestants are the whole body of

tax payers of the town, embracing those who never gave any consents and whose property could not, under the law, be burdened by these bonds against their will, except by the valid consent of the requisite majority; if such consent was not given, these contestants cannot be estopped by the omissions of other persons, acting without their authority, from showing the fact. A voter might do acts which, on general principles applicable to private transactions, ought to estop him from disputing the validity of his own vote, but that would not preclude others from demanding its rejection.

A tender of the stock before the commencement of the action was not necessary. In the first place when the town repudiated the authority of the railroad commissioners to issue the bonds, and demanded of the defendants that they be surrendered, the certificates of the stock were in the hands of the railroad commissioners. Furthermore, the appellants do not distinctly inform us to whom they claim that the stock should have been tendered. If the claim is that it should have been tendered to the defendants, the answer is that it was not received from them and they had no title thereto. If they had any right in respect to it (a point which we do not now decide), the most they could have claimed was an equitable right of subrogation, on canceling their bonds. If this right existed, the proper mode of protecting it was by a provision in the decree, unless the defendants at an earlier stage consented to surrender the bonds and demanded the subrogation. If the claim is that the stock should have been returned to the railroad company or canceled, that was a matter between the plaintiff and the company, and the plaintiff's right, as against the defendants, did not depend upon the previous adjustment of that matter. The claim of the plaintiff was that the bonds were absolutely void, and if the result of their being so adjudged was to entitle the railroad company to a cancellation of the stock which it had issued therefor, the company, and not the defendants, was the party to enforce that right. This is not the case of the rescission of a contract, but if it were dependent upon the same principles, the point would not be available. Even in such cases



a third party, whose title depends upon a contract claimed to have been rescinded, cannot set up a want of tender by the plaintiff to the original party, of the return of what the plaintiff had received under the original contract. For instance, when a sale of goods is rescinded by the vendor, on the ground of fraud, and he reclaims the goods from a transferee of his vendee, the transferee cannot defend on the ground that the securities received by the vendor from the original vendee have not been tendered back to him. (*Kinney v. Kiernan*, 49 N. Y. 164, 172.) In such a case the title to the securities reverts to the original vendee, on the rescission, but the right to insist upon their return is his, and not that of his transferee of the goods. (*Stevens v. Austin*, 1 Metc. 558; *Pearse v. Pettis*, 47 Barb. 276.) Even, therefore, if the principles governing the rescission of contracts were applicable to this case, they would not permit the defendants to set up the right of the railroad company to a return of its stock. There are still further grounds upon which it can be claimed that the town could not obligate itself by any ratification of the transaction, or become liable upon these bonds in any other manner than by means of proceedings strictly conforming to the provisions of the statute.

The point is again urged on this appeal that the affidavit of the assessors was conclusive. This point was clearly involved and adjudicated upon in our former decision. If the affidavit was conclusive, that judgment could not have been rendered, for the bonds could not have been shown to be invalid. Our view was that the statute declared that the affidavit should only be *prima facie* evidence. The proof of the consents is declared to consist of the affidavit of the assessors. This is the proof required to justify the railroad commissioners in the first instance in issuing the bonds. But, when the act speaks of what shall be the effect of the affidavit as evidence in court, it declares that a certified copy thereof shall be presumptive evidence of the facts therein stated. It surely cannot be that the only reason for thus limiting the effect of the certified copy is to guard against a variance between the original and the copy. Nothing is said about the effect of the original as evidence, and the act seems

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Statement of case.

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to contemplate that the genuineness of the signatures would have to be proved in case of contest, if the provision making the affidavit evidence of the fact were not inserted, and it, therefore, makes a certified copy of such affidavit presumptive evidence of the facts therein stated. This limitation of its effect being expressed, we would not be justified in construing the act so as to make the original affidavit conclusive by mere implication. The case of *People ex rel. Varoger v. Allen et al. Assessors* (52 N. Y. 538, 542) draws the distinction between the effect of this affidavit and of the judgment of a county judge under other bonding acts. We can only repeat what was said on the first appeal, that the intent of the statute on which this case depends, appears to have been to lodge the power of authorizing the bonding of the town in the majority of the tax payers, and not in the assessors.

The judgments should be affirmed, with costs.

All concur, except DANFORTH, J., taking no part.

Judgments affirmed.

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JOHN E. DEVELIN et al., Appellants, v. GEORGE W. COOPER,  
Sheriff, etc., Respondent.

Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 R. S. 28, § 1 *et seq.*), contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings.

If the order omits a recital of any necessary fact the sheriff will be protected if he can show *aliunde* the existence of the fact.

The said article includes a debtor who has been charged in execution.

The proof required to be made at the time of presenting the petition, and before granting the discharge (2 R. S. 35, § 2), that the debtor resides, or is imprisoned, in the county in which the officer to whom the application is made resides, may be made by the verified petition alone.

In an action against a sheriff for an escape, wherein he justified under a discharge granted by the county judge of the county of Suffolk, which

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Statement of case.

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contained a recital that "Frederick Maxwell, the debtor, of the town of Southhold, in the county of Suffolk, did present a petition." *Held*, that the recital was sufficient proof of the place of residence, and that proof thereof was made to the officer granting it.

The petition, which was verified to be "true in all respects," began thus: "The petition of Frederick Maxwell, of Southhold, in the county of Suffolk, \* \* \* respectfully sheweth," etc. The petition recited that Maxwell was in custody of the sheriff of Suffolk county on execution and had given bail for the jail liberties. *Held*, that the first statement was not sufficient to make proof of residence in the county; but that being out of jail on the liberties was, in the judgment of the law, being in prison; and the last recital, therefore, was in effect an averment of imprisonment in the county, and so gave jurisdiction of the person of the debtor. The said article of the Revised Statutes was not repealed by the act abolishing imprisonment for debt (chap. 800, Laws of 1831).

Nor was it repealed by the provision of the Code of Procedure (§ 179, sub. 4), authorizing the arrest of a defendant in an action on contract who has been guilty of fraud in contracting the debt or incurring the obligation.

The provision of the statute (3 R. S. 23, § 35, sub. 7) declaring a discharge of an insolvent from his debts void "if he shall be guilty of any fraud whatever contrary to the true intent" of the article, refers to a fraud perpetrated in the proceedings to obtain the discharge, not to a fraud in the creating of the debt.

It was proved that the discharge was handed to the defendant and he was asked if he would let Maxwell go; that he took time to advise with his counsel, and that the next day Maxwell was at his home beyond the jail liberties. *Held*, the presumption was that he was set free in consequence of the discharge.

There was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached. *Held*, that there was no exception bringing the error, if any, to the notice of this court.

(Argued February 8, 1881; decided March 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order, made February 10, 1880, which affirmed a judgment in favor of defendant, entered upon a decision of the court, after verdict taken by direction of the court for plaintiff with leave to either party to enter judgment according as it should thereafter be determined by the court. (Reported below, 20 Hun, 188.)

## Statement of case.

The nature of the action and the facts are set forth sufficiently in the opinion.

*Thomas Stevenson* for appellants. The act to abolish imprisonment for debt (chap. 300, Laws of 1831) was, by implication, a repeal of article 5, chapter 5, title 1, part 2, Revised Statutes. (*Hickman v. Pinckney*, Court of Appeals, June 1, 1880.) It is not consistent that a statute should remain in force which could shield the fraudulent debtor from arrest under section 179 of the Code of Procedure, and thus nullify the later legislation. (Code of Procedure, § 468.) The fifth article afforded relief to the insolvent debtor from the apprehension of arrest, and from imprisonment on the *capias* [see §§ 10 and 11], but did not contemplate a case where the debtor had been charged in execution. (Art. 7, §§ 21, 22.) The whole proceeding before the county judge was, therefore, wholly unwarranted and void. (*Speer v. Wandell*, 1 Comst. 149; *Jefferson Co. Bank v. Powell*, 3 How. Pr. 113; *Matter of Walter Brady*, 69 N. Y. 215; *People ex rel. Gals-ten v. Brooks*, 40 How. Pr. 165; *Spencer v. Barber*, 5 Hill, 568.) The county judge had no general jurisdiction to discharge Maxwell from the execution. The recitals in the order were not proof of the facts recited to confer jurisdiction. (*McElroy v. Mancius*, 13 Johns. 120; *Burnett v. Burch*, 1 Den. 141; *Bullymore v. Cooper*, 46 N. Y. 575; *Frees v. Ford*, 6 id. 175; *Simmons v. De Barre*, 8 Abb. Pr. 269.) The discharge does not contain a recital of facts necessary to confer jurisdiction. (*Castellanos v. Jones*, 5 N. Y. 164; *Hal v. Sweet*, 40 id. 97; 2 R. S., chap. 5, p. 35, art. 7; *Otis v. Hitchcock*, 6 Wend. 433; *Bullymore v. Cooper*, 46 N. Y. 246; *Matter of Brady*, 69 id. 215; *People v. Abel*, 3 Hill, 109; *People v. Reed*, 5 Den. 554; *Matter of Prime*, 1 Barb. 296.) The inventory was evasive, and not "true and full." (*Bullyman v. Cooper*, 46 N. Y. 246; *Stanton v. Ellis*, 12 id. 575; *People v. Bancker*, 5 id. 106.) The omission to state the consideration for the drafts on the Metropolitan Bank was fatal to the proceedings. (*Slidell v. McCrea*, 1 Wend. 156;

## Opinion of the Court, per FOLGER, Ch. J.

*McNair v. Gilbert*, 3 id. 344; *Rockwell v. McGovern*, 69 N. Y. 294; *Doicken v. Ahlbon*, 2 Abb. N. C. 375; *Stanton v. Ellis*, 16 Barb. 319; 3 Cow. 59; *Morrow v. Freeman*, 61 N. Y. 515.) The judge had no jurisdiction without publication of the contents of the order, and proof of its publication. (See pp. 11, 22, 23, §§ 3, 4, art. 5, and § 10, art. 3, 2 R. S.; 2 R. S., chap. 5, art. 3, 5, §§ 3, 4, 10, pp. 11, 22, 23; *People v. Grey*, 19 How. Pr. 238; *Stanton v. Ellis*, 19 Barb. 319.) The appellants were entitled to judgment on the verdict. It was error for the justice to reserve the case for his own consideration; he had no power to do it. (*Sayles v. Sims*, 73 N. Y. 551; *Purchase v. Mattison*, 25 id. 212; 1 Bla. Com. 60, 81, etc.; Sedgwick on Statutory and Constitutional Law, 31, 195, 209, 212, etc.; *Tonnell v. Hall*, 4 Comst. 140; new Code, § 158, subd. 2.)

*Wm. Wickham* for respondent. Article 5, chapter 5, title 1, part 2, Revised Statutes, had not been repealed when Maxwell made his application under it. (Code of Procedure, § 178; Code of Civil Procedure, §§ 2147-2218.) The discharge was conclusive evidence of the proceedings and facts therein contained. (Code of Civil Procedure, §§ 2181, 2196, 2197; *Stanton v. Ellis*, 2 Kern. 575; *Hart v. Dubois*, 20 Wend. 236; *People v. Warren*, 5 Hill, 440; *Hayden v. Palmer*, 24 Wend. 366; *American Flask & Cap Co. v. Son*, 3 Abb. [N. S.] 333.)

FOLGER, Ch. J. This is an action against a sheriff for an escape. Maxwell, the prisoner, had been taken into custody by the sheriff on an order for arrest, in an action on a contract, and was after that duly charged in execution against his body on a judgment in the action and held by the sheriff thereon. While he was so held, the county judge of Suffolk county made an order exempting him from imprisonment by reason of any prior debt. This order having been exhibited to the sheriff, he suffered Maxwell to go at large. This act of the sheriff is the escape for which he is sued. It does not appear that the sheriff, when he let Maxwell go, had any knowledge or informa-

tion of the proceedings before the county judge, other than what was given to him by the order of discharge and the recitals in it.

It is settled that if an order of that kind contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect the sheriff in releasing the prisoner; that if it does not contain those recitals, the sheriff will be protected if he can show, *aliunde* the order of discharge, that the needed facts existed. (*Bullymore v. Cooper*, 46 N. Y. 236.) There are three things needed to give jurisdiction: First, power by law to act upon the general subject-matter, which, in this case, was the discharge of an insolvent debtor from liability to arrest upon prior debts, and from actual imprisonment upon any of them. If the Revised Statutes on that subject are yet in force, the county judge of Suffolk county had that power by virtue of their provisions. (2 R. S. 28, § 1; *id.* 34, § 1.) Second, jurisdiction of the person of the particular insolvent. To have this jurisdiction, in this case, the insolvent debtor must have resided, at the time of presenting his petition, in the same county with the judge to whom it was presented, or have been imprisoned in that county. The proofs in the case, *aliunde* the discharge, show that Maxwell resided at Southhold, in the county of Suffolk, and that he was on the jail liberties of that county when he presented his petition to the county judge thereof. This establishes that the fact existed. But it is required by statute (2 R. S. 35, § 2) that, in a case like this, proof of such residence or imprisonment shall be made at the time of presenting the petition and before any order shall be made thereon. This proof could have been sufficiently made by the affidavit of a person other than the petitioner. (*In re Wrigley*, 8 Wend. 134, 138.) The proof is required by the statute, to prevent an abuse of the privilege of applying for a discharge, and to insure the publication of the notice to creditors in the proper county. But such proof is not conclusive; it is preliminary, merely. (*Id.* 139.) Hence, there is not required the same strictness of proof in kind as would be needed on a trial. As we have seen above, (8 Wend.,

*supra*), an *ex parte* affidavit is enough, and, as is shown *infra*, the petition alone is enough. And the discharge is proof of the place of residence if it state the fact. (*Jenks v. Stebbins*, 11 Johns. 224; *Stanton v. Ellis*, 12 N. Y. 575.) The discharge in this case recites that "Frederick Maxwell, of the town of Southhold, in the county of Suffolk and State of New York, did present a petition," etc. Such a recital seems to have been held a sufficient proof of the fact of residence, when the question of jurisdiction came up collaterally. (*Barber v. Winslow*, 12 Wend. 102.) On the trial of our case, proof was made of some papers that were presented to the county judge on the application for the order. Of these was the petition of the debtor, beginning: "The petition of Frederick Maxwell, of Southhold, in the county of Suffolk and State of New York, respectfully sheweth," and accompanied by his affidavit that the petition "is true in all respects." This statement in the petition was not enough to make proof of the fact of residence in the county. (*Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 id. 158.) If it were shown that no proof other than the petition was produced to the county judge, it might go hard with a person who needed to uphold his jurisdiction of the case, and who was compelled to do so by show of facts *aliunde* the recitals of the discharge itself. The sheriff is not in that category. He can rely on the recitals of the discharge, and they, as we have seen, are sufficient to show the fact of residence, and that proof of the fact was made to the officer making the order. (12 Wend., *supra*.) Nor does it appear from the case that no other paper than the petition was presented to the county judge when application was made. Jurisdiction may not be established in this negative way. But this negative comes in play when the recitals of the discharge are sufficient for the reliance of the sheriff and he bases his conduct upon them. Again, there is another fact which, if it existed and was proven, gave jurisdiction of the person, and that is the fact that the debtor was imprisoned in Suffolk county. (2 R. S. 35, § 2.) Now the petition did fully allege, not as matter of description but as statement of fact, that Maxwell was then

in custody of the sheriff of Suffolk county, on execution, and had given bail for the jail liberties. That a statement of a jurisdictional fact, in a verified petition, is preliminary proof of the fact, is to be inferred from 3 N. Y. and 8 N. Y. (*supra*). And see *Dyckman v. The Mayor* (5 N. Y. 434). Being out of jail on the liberties is, in the judgment of the law, being in prison (*Holmes v. Lansing*, 3 Johns. Cas. 75; *Peters v. Henry*, 6 Johns. 121); and this notwithstanding *Bylandt v. Comstock* (25 How. Pr. 429), which may be deemed to have gone off on the other point involved therein. We are of the opinion that the judge of Suffolk county had jurisdiction of the person of the debtor. Third, jurisdiction of the particular case. To obtain that, the debtor must have presented a petition to that officer, praying that the estate of the debtor may be assigned for the benefit of all his creditors, and that his person may be exempted from arrest or imprisonment (2 R. S. 28, § 1); and a schedule containing an account of his creditors; and an inventory of his estate, in a certain form and with certain contents (*id.*, § 2; *id.* 17, § 5); and an affidavit in a prescribed form (*id.* 28, § 2). The discharge by its recitals shows the presentment of such a petition and an account and inventory, though the form and the contents of the account and inventory are not set forth or stated in it. The recital is enough to show that the proper petition was presented. The proof, *aliunde* the discharge, shows that the proper affidavit was annexed to the petition and schedule. The proofs *aliunde* show just what were the account and inventory delivered. Objections are made that they did not comply with the statute, and did not fully meet its demands. The objection to the account of creditors is that it does not set forth the true cause and consideration of some of the indebtedness and the place where it accrued. The place is in each case stated to be New York city. The account states an indebtedness to the Metropolitan National Bank, at No. 108 Broadway, New York city, and that it is on certain drafts drawn by Maxwell, the debtor, and discounted by the bank. It states an indebtedness to Samuel T. Payson, giving his address and the place of the accruing of it, and for



cause and consideration, that it arose upon certain promissory notes and sundry transactions between Payson and the debtor. It needs not that we seek whether the schedule is enough in its statement of cause and consideration in these two items of indebtedness. We have seen above that the recitals of the discharge are *prima facie* evidence of jurisdictional facts, and that they will protect the sheriff in his action under it. It may well be that between the debtor and his creditors, the statements in the schedule may not save the discharge from the reprehension of the law. (2 R. S. 17, 23, 30, §§ 5, 13, 35.) But there is a distinction to be made between the case of creditors, seeking their debt from the debtor himself, and creditors seeking the debt through an action against a sheriff for an official act of his. The statutes last above cited, as interpreted by decisions, make the discharge void as against creditors, where there is a lack of proper statement of cause and consideration of indebtedness. But where there is exhibited to a sheriff an order of discharge such as a county judge is authorized to make, and it shows on its face that it is such an one; as it is an order from a superior in authority, made for the guidance and control of an inferior in authority, the latter may obey it without inquiry for the existence of facts that gave jurisdiction, and may justify under it without showing that they existed. (*Bennett v. Burch*, 1 Den. 141, cited and approved in 46 N. Y., *supra*; *Potter v. Merchants' Bank of Albany*, 28 id. 641.) Now, the order of discharge in the case in hand does state that the account and inventory of the petitioning debtor, presented with his petition, are true, and that he has conformed in all respects to the matters and things required of him, according to the true intent and meaning of the statute. The order is different in this respect from that in 46 N. Y. (*supra*), which was held not to protect the sheriff. It needs not, for the same reason, to seek whether the inventory was in this case sufficient; nor whether the order to show cause was duly published and served. The discharge asserts that it was in due form to meet the terms of the Revised Statutes. Our conclusion is that the sheriff on the trial showed either *prima*

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*facie* by the recitals in the order, or *aliunde* the order wherein it was lacking, that there was jurisdiction in the county judge to grant it, if the Revised Statutes, under which the judge acted, were yet in force. Whether they did depends upon the soundness of some objections raised by the appellants, and those we will now consider.

1st. It is contended that the fifth article (2 R. S. 28) has been repealed, by implication, by the act to abolish imprisonment for debt (Laws of 1831, chap. 300). We do not think that the provisions of the two statutes are so inconsistent and incompatible as that the former was impliedly repealed by the latter.

2d. It is contended that the old Code (§ 179), having provided that where a debtor has been guilty of fraud in contracting the debt or incurring the obligation, he may be arrested, a statute is not consistent with it that will exonerate him from imprisonment; as that would be to nullify the Code. We are not able to so hold. The obligation is still one arising on contract. The debtor would not be liable to arrest but for the fraud, but that is only a case of exception from the general exemption from arrest on contract. It is still a case of contract, a case of debt. The statutes unrepealed provide for a discharge from imprisonment by reason of any debts arising upon contracts previously made. We do not find in the Code, the intention of the legislature, that where the debt was created in fraud, the debtor should never be exonerated from imprisonment for such a debt on complying with the provisions of laws.

3d. It is contended, that as a discharge under article 5 shall be void if the insolvent shall be guilty of any fraud whatever contrary to the true intent of the article (2 R. S. 23, § 35, subd. 7), that it follows that a discharge from a debt contracted in fraud is void. Our opinion is, that the fraud that renders a discharge void under the statutory provisions referred to, is one done in the proceedings under the statute to obtain a discharge, and not a fraud that has gone before and in which the making of the debt was involved.

4th. It is further contended that the fifth article did not con-

template the case of a debtor who had already been charged in execution as Maxwell had been in this case. But the first section of article 5 provides for a petition that the person of the debtor be exempt from arrest, and that if he is in prison, he may be discharged from imprisonment. Section 11 provides that if the insolvent be in prison, in any suit upon any contract, he shall be discharged. The sixth article relates only to cases where persons imprisoned on execution in civil cases propose to assign their property for the benefit of the creditors by whom they are imprisoned, and thereupon to be discharged from that imprisonment alone. (1 Seld. 121, 123, and note.) The fifth article is more general in its scope, and takes in all creditors and all imprisonment on contract, and includes the execution creditor with the rest.

In addition to these objections, it is urged that the proofs made by the defendant show lack of jurisdiction in the county judge. Should this be granted it would not avail the plaintiff. The defendant was not shown to have known, at the time that he let Maxwell go, of any defects in the proceedings. All that he had for his guidance, as it appears, was the discharge. In so far as it showed jurisdiction, so far it protected him, and he is not affected therein by the existence of facts though variant from it. In so far as it did not show jurisdiction, if the fact existed, that in that respect gave jurisdiction, he is thereby protected.

It is further contended, that the learned justice who tried the cause at Circuit had not power to take a verdict for the plaintiff and to reserve the case for further consideration before rendering judgment, and then to render judgment for the defendant. It is likely that the practice in the case has not been technically accurate. But it seems to have been had without objection from either party, and there is no exception that brings the error, if any, to our notice. There is an exception to the judgment, but none to the mode which the court took to reach a judgment. There is no controverted question of fact in the case. The questions to be determined are purely legal, and though the mode taken to reach a final determina-

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tion of them, may not have been strictly formal, both parties have acquiesced in it, and sought the judgment of the courts below without resistance to the case being entertained and adjudicated there.

It is contended that it is not pleaded nor proved that Maxwell was let to go by reason of the discharge. The answer sets up the discharge, and avers that thereupon Maxwell was discharged from imprisonment. It was proven that the discharge was handed to the defendant and that he was asked if Maxwell would be let to go, that the defendant took time to advise with his counsel; and that the next day Maxwell was at home beyond the liberties of the jail.

There can be no inference reasonable, but that in consequence of the mandate of the discharge the debtor was set free.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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JOHN C. SOUTHWICK, Respondent, v. THE FIRST NATIONAL  
BANK OF MEMPHIS, Appellant.

Where plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal.

In such case the pleadings cannot, after the trial, be conformed to the proof. It is no answer to the objection that defendant was probably not misled.

The obligation of a party to refund money, voluntarily paid to him by mistake, can arise only after notification of the mistake, and demand of payment.

Where a demand is necessary it is not excused by showing that defendant would not probably have complied if one had been made; and it matters not that defendant, on the trial, contests plaintiff's right to recover.

Where a bill of exchange is paid to one who holds it in good faith and for value, he cannot be called upon to account for the money paid, upon proof that in transactions between the drawer and drawee, of which he had no knowledge or means of knowledge, there has been some fraud or mistake to the injury of the drawee; and this, although the holder, not

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having parted with value at the time when he took the draft, could not have enforced it against the drawee, even after acceptance.

This rule is based upon principles of public policy.

In March, 1878, T., of the firm of S., T. & Co., doing business at Memphis, drew his draft upon that firm, payable to the order of J. M. N. & Son, a Boston firm. The draft was accepted by the drawees, payable at Memphis in forty days. The holder sent the draft to Memphis for collection. Before it fell due the drawees notified the payees that they would not be able to meet it, and requested permission to draw for the amount. Permission was granted by telegram to draw at sight to pay said draft. S., T. & Co. thereupon drew upon J. N. M. & Son a sight draft for the amount. This draft was discounted by defendant, and with the assent of the drawers the proceeds were placed to their credit, their account with defendant being at that time overdrawn to more than the amount. J. N. M. & Son accepted the new draft on presentation, and subsequently paid it. S., T. & Co. drew a check on defendant to pay the old draft which it refused to honor, and refused to pay said draft when presented. S., T. & Co. soon after became insolvent. In an action to recover the amount of the new draft it was not alleged, nor was it proved, that a demand or offer to return the draft was first made, or that defendant had any knowledge of the telegram, or the purpose for which J. N. M. & Son authorized the drawing of the new draft. The court directed a verdict for plaintiff. *Held*, error; that neither a cause of action for a conversion of the draft, nor one to recover back moneys paid by mistake, was established.

The complaint alleged that defendant was notified of the purpose for which the new draft was authorized to be drawn; that it received it, agreeing to collect and apply the proceeds for that purpose, but that it refused so to do. *Held*, that the court erred in denying a motion for a nonsuit, as plaintiff failed to prove the cause of action alleged in the complaint.

*It seems*, that had the complaint been sufficient, and had a proper demand been made, plaintiff would not have been entitled to recover.

*Comstock v. Hier* (73 N. Y. 269), distinguished.

To entitle a party to relief, on the ground of mistake, it must be a mistake as to some existing fact, not as to something to occur in the future; and it must be a mistake as to some fact bearing directly, not remotely, upon the act against which relief is sought.

*Southwick v. First National Bank* (20 Hun, 849), reversed.

(Argued February 9, 1881; decided March 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, in favor of plaintiff, entered upon an order made the first Monday of January, 1880,

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overruling defendant's exceptions, and directing judgment upon a verdict. (Reported below, 20 Hun, 349.)

The nature of the action and the material facts are set forth in the opinion.

*Francis C. Barlow* for appellant. Where accommodation paper is diverted, it can only be enforced by a *bona fide* holder for value. (*Justh v. National Bk. of the Commonwealth*, 56 N. Y. 478, 484; *Stephens v. Bd. of Education*, 79 id. 183; *Gannon v. Butler*, 48 Me. 344; *Skinner v. Merchants' Bk.*, 4 Allen, 290, 294.) Discounting a note, and discharging a prior debt with the proceeds, is the same thing in legal effect as the payment of money on the debt. (Edwards on Bills [ed. of 1857], 322.) The presumption was that the draft was drawn against funds. (*Griffith v. Reed*, 21 Wend. 501.) One who takes an unaccepted draft has the same rights against the person who afterward accepts it, as if it were accepted at the time. (*Bk. of Louisville v. Ellery*, 34 Barb. 630; *Mechanics' Bk. v. Livingston*, 33 id. 458.) The mistake of fact which enables the payer to recover must be a mistake "as to a fact, which, if true, would have rendered the party paying liable to pay the money, and not one as to a fact, which, if true, would have rendered it desirable that he should pay it." (*Aiken v. Short*, 1 H. & N. 209, 213.) The mistake must be as to a present existing fact which affects the liability of the payer to pay. (*Dambman v. Schulting*, 75 N. Y. 63; *Gallagher v. Brunel*, 6 Cow. 346.) The collection of the note was not a conversion of it. (*Walter v. Bennett*, 16 N. Y. 250; *Stall v. Catskill Bk.*, 18 Wend. 478.) The declarations of the defendant's cashier, having been made more than a year after the event, and not being shown to have been a part of any *res gestæ*, in no way bind or affect the defendant, as admissions. (*Luby v. R. R. Co.*, 17 N. Y. 131; *Baptist Church v. Ins. Co.*, 23 How. 448; *S. C.*, 28 N. Y. 153, 160; *Bank v. Stewart*, 37 Me. 519.) The burden is upon one who offers the declarations of an agent, to show that they were made at a time, and in a connection, which makes them a part of the *res gestæ*.

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(*Baptist Church v. Ins. Co.*, 23 How. 450.) The plaintiff cannot recover because no proper demand was made prior to suit. (*Powers v. Bassford*, 19 How. 309; *Sluyter v. Williams*, 37 id. 109; *Stacy v. Graham*, 14 N. Y. 497; *Freeman v. Jeffrees*, L. R., 4 Exch. 189, 200, 201; *Stevens v. Bd. of Education*, 3 Hun, 712; Chitty on Contracts [11th Am. ed.], 477; *Doe v. Walters*, 10 B. & C. 626.) The judgment should be reversed, because there has been a recovery on a cause of action which not only is not declared on, but which is absolutely fatal to that declared on. (*Lawrence v. Fox*, 20 N. Y. 268; new Code, § 519; *Bates v. Rosekrans*, 23 How. 98, 101, 102, 103; 37 N. Y. 409, 412; *Beach v. Steamboat Co.*, 18 How. 336; *Equitable Ass. Co. v. Cuyler*, 75 N. Y. 511, 514, 515; *Wright v. Delafield*, 25 id. 266; *Simmons v. Kayser*, 43 N. Y. Super. Ct. 137, 138.) The doctrine of "conforming the pleadings to the proof" does not apply in such a case. (New Code, § 541.) The recovery must be *secundum allegata et probata*. (*Beard v. Yates*, 2 Hun, 466; *Peck v. Root*, 5 id. 547, 550; *Barnes v. Quigley*, 59 N. Y. 265, 268.) Inconsistent actions cannot be joined. (*Smith v. Hallock*, 8 How. 78; *Sweet v. Ingersen*, 12 id. 331; *Budd v. Bingham*, 18 Barb. 494; *Lattin v. McCarthy*, 17 How. 239; new Code, § 539; *Hubbell v. Lerch*, 58 N. Y. 237.) The court has no jurisdiction. (*Crocker v. Marine Nat. Bk.*, 101 Mass. 240; *Tracy v. Cadle*, 11 Blatchf. 101.) Consent does not give jurisdiction. (*Tracy v. Cadle*, *ubi supra*; *U. S. v. Yates*, 6 How. [U. S.] 605; *Capron v. Van Norden*, 2 Cranch [Cir. Ct. R.], 126; *Heriot v. Davis*, 3 Woodbury & Minot, 229; *Heyer v. Burger*, Hoffman, 1; *Valarino v. Thompson*, 7 N. Y. 576.)

*John E. Burrill* for respondent. The rule in regard to drafts or notes diverted from the purpose to which they were restricted differs from that applicable to mere accommodation paper; and in the former case the receipt of the diverted paper, even in payment of a precedent debt, will not entitle the creditor to recover. (*Stalker v. McDonald*, 6 Hill, 93;

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*Weaver v. Barden*, 49 N. Y. 293; *Comstock v. Hill*, 73 id. 269; *Haynes v. Rudd*, 24 N. Y. S. C. 477; *Coddington v. Bay*, 5 Johns. Ch. 54; *S. C.*, 20 Johns. 637; *Stenens v. Corn. Ex. Bk.*, 3 Hun, 150; *Fulton Bk. v. Phenix Bk.*, 1 Hall, 562.) The acceptors of the draft having paid it under a mistake of fact, the plaintiff, as their assignee, was entitled to recover back the amount as so much money had and received to their use. (*Smith v. Macklin*, 4 Lans. 51; *Rider v. Powell*, 28 N. Y. 316; *Duncan v. Berlin*, 46 id. 685; *Kingston Bk. v. Eltinge*, 40 id. 395; *Merchants' Bk. v. National Eagle Bk.*, 101 Mass. 285; *Appleton Bk. v. McGilray*, 4 Gray [Mass.], 520; *Westerlo v. De Witt*, 36 N. Y. 340; *Martin v. McCormick*, 8 id. 331; *Mills v. Alderbury*, 3 Exch. 593; *Chester v. Bank*, 16 N. Y. 336; *Lake v. Artisans' Bk.*, 3 Keyes, 276, 278; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Goddard v. Merchants' Bk.*, 2 Sandf. 247; *Rheel v. Hicks*, 25 N. Y. 289.) The fact, that by the exercise of proper diligence the assignor of plaintiff might have avoided the error, is no defense. (*Kingston Bk. v. Eltinge*, 40 N. Y. 395; *Nat. Life Co. v. Jones*, 1 N. Y. S. C. [T. & C.] 470; *Duncan v. Berlin*, 46 N. Y. 685; *S. C.*, 11 Abb. Pr. [N. S.] 116.) The rule that the plaintiff's recovery may be defeated by showing that the defendant has a counter equity to retain the money is not law in this State. (*Canaday v. Stiger*, 55 N. Y. 453.) The fact that the defendant received the proceeds of the draft in money, and that the money when so received was applied to the credit of Southworth, Thayer & Co., does not prevent the plaintiff from recovering it back, when it was paid by him to defendant under mistake, and when the defendant will not be prejudiced by canceling the credit which he has given to Southworth, Thayer & Co. (*Van Allen v. Am. Nat. Bk.*, 52 N. Y. 8; *Tradesmen's Bk. v. Chem. Bk.*, 1 Paige, 302; *Mechanics' Bk. v. Levy*, 3 id. 606; *Skinner v. Merchants' Bk.*, 4 Allen, 290; *Atlantic v. Same*, 10 Gray, 532.) As no question was submitted to the jury, and in the disposition of the case made at the trial all the evidence covered by the objections taken by defendant was either immaterial, or the fact was otherwise abundantly proved,



and the result was not in any wise affected thereby, its reception, even if erroneous, is no ground for a new trial. (*Sherman v. Johnson*, 56 Barb. 59-62; *Bennett v. Austin*, 5 Hun, 536; *Downe v. N. Y. C. R. R. Co.*, 56 N. Y. 664; *Rowland v. Hegeman*, 59 id. 643.) As the complaint contained all the allegations necessary, with the proof in the case, to entitle the plaintiff to recover, the allegation that the defendant agreed to apply the proceeds of the draft in a particular way may be rejected as surplusage, and does not prevent the plaintiff from recovering on the other allegations. (*Byrnie v. Wood*, 24 N. Y. 607-610.) The General Term had authority to conform the pleadings to the proof, and as there was no dispute in regard to the facts, and there being no evidence or pretense of surprise, its authority was properly exercised. (New Code, 723.) Any defect in the pleadings, such as is alleged, is cured by the Code (§ 721, subd. 5-8). The fact that the defendant's bank was a National bank, organized under the National Banking Act, was wholly immaterial, and no defense could be based thereon, except that of jurisdiction, which is *res adjudicata* in this State, and which, moreover, was waived by the general appearance and answer of the defendant. (*Cooke v. State Bk.*, 52 N. Y. 96; *Robinson v. National Bk.*, 22 Alb. L. J. 15.)

EARL, J. The defendant claims that the plaintiff failed upon the trial to establish by proof the cause of action alleged in his complaint. To determine whether this claim is well founded, we will first see what facts were proved, and thus ascertain for what cause of action the recovery was had, and then see if such cause of action is fairly embraced within the facts alleged in the complaint.

The material facts, as proved, are as follows: Southwick, Thayer & Co. were a firm doing business in Memphis, Tenn., and J. N. Merriam & Son were a firm doing business in Boston. On the 13th day of March, 1873, George H. Thayer, a member of the Memphis firm, drew a draft upon that firm, which was accepted by them, for \$2,500, payable in Memphis in forty days, to the order of the Boston firm. The latter firm

indorsed the draft to F. P. Merriam, who became the owner and holder thereof, and he sent the draft to Memphis for collection. Shortly prior to the maturity of that draft A. N. Merriam, of the Boston firm, being at Memphis, was notified by the Memphis firm that probably they would not be able to pay the draft at maturity, and was asked if, in that case, they might draw on the Boston firm a new draft, the proceeds of which should be used to take up the old draft. This request was assented to on condition that they should not draw the new draft without special authority. Early in May the Memphis firm notified the Boston firm that they would not be able to take up the old draft, and requested permission to draw. Whereupon, on the fifth day of May, the Boston firm sent them a telegram, as follows: "You may draw upon us at sight for \$2,500, to pay draft in our favor." On the next day the Memphis firm drew upon the Boston firm a sight draft for \$2,500, payable to their own order and indorsed by them; and their book-keeper, Wiggs, on their behalf, took it to the defendant's bank, with which they had had previous dealings and an account, and asked defendant's cashier if he would discount it and let his firm check out the proceeds. This the cashier refused, but he said he would take the draft and place it to the credit of the drawers on over checks owing by them to the bank. Wiggs then consulted the drawers, and on the same day, with their assent, delivered the draft to the bank to be discounted, the proceeds to be credited to them in account, and they were thus credited. At that time the drawers were indebted to the bank in a much larger sum than the amount of the draft. The bank had no knowledge of the telegram authorizing the drawing of the draft, or of the purpose for which the drawers were authorized to draw. The bank thus became a *bona fide* holder of the draft for value, but not for value parted with at the time. Several days subsequently the Memphis firm drew a check on the defendant to pay the old draft, and it refused to pay the check, on the ground that their account was not then good.

After receiving the new draft and crediting its proceeds to

the account of the drawers, the defendant sent it to its corresponding bank in Boston for collection. That bank presented it to the drawees for acceptance and payment, and it was accepted May 10th and paid May 13th, and the proceeds were credited by the Boston bank to the defendant, and were by it subsequently checked out in the course of its business.

The Memphis firm was not, at the time of the negotiation of the new draft, known to be insolvent, but they became openly insolvent in the latter part of June or the fore part of July, 1873, and were subsequently put into bankruptcy. This suit was not commenced earlier than the 29th day of July. At the latter date the Boston firm and F. P. Merriam assigned all their claims against the defendant to the plaintiff.

Upon these facts the court directed a verdict for the plaintiff, and its decision was probably based upon the theory that the defendant could be charged with a wrongful conversion of the draft, or upon the theory that the drawees paid the draft under a mistake of facts. In the opinion pronounced at the General Term, the judgment entered upon the verdict was sustained upon the latter theory, and the learned counsel for the plaintiff, in his argument before us, attempted to sustain it upon both theories.

It is entirely clear that no cause of action for a conversion of the draft, or to recover back money paid by mistake, is alleged in the complaint. On the contrary, the facts alleged show that there was no wrongful conversion of the draft, and that the money was paid under no mistake of any existing facts, and no mistake is in any way alleged or to be inferred from the language used.

The complaint first alleges the making of the old draft, and that the same was owned and held by F. P. Merriam; that it had matured and become payable and had been forwarded to Memphis for collection; that the Boston firm authorized the new draft to be drawn upon them in order to provide funds necessary to pay the old draft, and agreed to pay such draft upon condition that the proceeds should be used for that purpose only; that the new draft was thereupon drawn and deliv-

ered to the defendant, which was notified of the object and purpose for which the draft was authorized to be drawn, and for which the same was drawn, and that it received the draft and undertook and agreed to collect the same for the purpose aforesaid, and that the proceeds thereof, when collected, should be applied to the payment thereof; that the draft was accepted and paid for the object and purpose and upon the condition aforesaid, but that the defendant neglected and refused to apply the amount paid upon the old draft, although requested so to do; that the draft remains unpaid and that J. N. Merriam & Co. and F. P. Merriam have sold and transferred the same and the moneys paid thereon to the plaintiff, together with all claim and cause of action against the defendant upon or by reason thereof, or by reason of the premises and the matters before alleged; and judgment is demanded for \$2,500, and interest from May 6, 1873.

It is thus seen that the only cause of action alleged in the complaint is based upon the promise of the defendant to take the draft, collect it and apply the proceeds upon the old draft. This is plainly and explicitly set out. The proof entirely failed to establish such a cause of action, and the objection that it did so fail was plainly and pointedly, several times, taken at the trial.

The Code requires that the complaint must contain a plain and concise statement of the facts constituting the cause of action, and that the pleadings must be liberally construed with a view to substantial justice between the parties; and in section 723 ample power is conferred upon the court to amend pleadings at any stage of the action, and where the amendment does not change substantially the claim or defense, to conform the pleadings to the facts proved. Here, although the defect in the complaint was pointed out in due time upon the trial, no amendment was asked for or ordered. This is not a case where the pleadings can after the trial be conformed to the proof, as such an amendment would change substantially the claim of the plaintiff as alleged. This is not a case of mere variance or mere defect, but a case of failure to prove the cause of action

alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. Here the defendant was brought into court to answer a complaint that he had violated his promise to apply the proceeds of the draft, and he took issue upon the alleged promise and when he came to trial he was held liable, not for any breach of promise but for the money paid by the Boston firm on the ground of a conversion of the draft, or the mistake of facts which induced the payment of the money. The cause of action alleged was one held by the plaintiff, as assignee of F. P. Merriam, for the breach of the promise to pay the old draft owned by him. The cause of action for which the recovery was had was one which the plaintiff held, as assignee of J. N. Merriam & Co., for the recovery of the money paid by them upon the new draft.

It is no answer to this objection that the defendant was probably not misled in its defense. A defendant may learn outside of the complaint what he is sued for and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured.

But passing this point the defendant further contends that the plaintiff ought to have proved a demand upon it for the draft, or the money paid thereon, before commencement of the suit; but that he failed to prove such demand.

It is not disputed by the plaintiff that such a demand was necessary unless it was in some way waived by the defendant, or unless it was in some way estopped from insisting upon

a demand. Whether the action be treated as one for the conversion of the draft, or of the money paid thereon, or for the recovery of money paid by mistake, a demand was a prerequisite to the maintenance of the action against the defendant, who lawfully and innocently received the draft and the money paid thereon. The obligation of a party to refund money voluntarily paid by mistake can arise only after the notification of the mistake and a demand of payment. (*Powers v. Bassford*, 19 How. Pr. 309; *Sluyter v. Williams*, 37 id. 109; *Stephens v. Board of Education*, 3 Hun, 712; *Stacy v. Graham*, 14 N. Y. 492; *Freeman v. Jeffries*, L. R., 4 Exch. 189, 200, 201.)

Here the requisite demand was not only not proved, but was not alleged in the complaint. The only demand alleged was a request to apply the proceeds of the new draft upon the old one in pursuance of the alleged promise of the defendant. No demand to pay the money to the plaintiff or his assignors is alleged, and none was proved to have been made before the commencement of the action. There was no proof that, before the commencement of the action, defendant had any knowledge of the telegram of May 6th, or of the purpose for which the drawers were authorized to draw the new draft, or of any claim that the drawees had paid the draft under any mistake, or that they claimed that the money paid should be refunded to them. There is no proof even that it had any knowledge that the draft or its proceeds had been improperly diverted. It is shown that it refused to pay a check drawn to take up the old draft and declined to pay that draft when presented, but it is not shown that they were, at the time when the check and draft were presented for payment, or at any other time before the commencement of the suit, informed of the circumstances now relied upon by the plaintiff, connecting that draft with the new one.

The plaintiff, at the trial, attempted to show a demand or an excuse for not making one by two letters, and unless such demand or excuse is found in these letters, it is not found in the case. The first letter is dated May 13, 1873, and was ad-

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Opinion of the Court, per EARL, J.

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dressed by the Boston firm to W. W. Thacher, cashier of the defendant at Memphis. It is as follows:

"SIR — We are much surprised at the communication we have received this day from S. T. & Co., relating to the position you have taken about the draft on us, viz. : not honoring their checks and allowing them to pay their draft in our favor.

You had our explicit authority to draw on us (purpose specified also), and you have never yet had occasion rightly to doubt our honor and ability to pay all we contracted to, to the utmost farthing. We, of course, recognize your right to decline to cash their draft; that must be as your own judgment dictates. But to obtain their obligations and retain the funds for two weeks, thus putting us to annoyance and inconvenience without just cause, is not in accord with our New England ideas of honorable business dealing. All through this unfortunate affair we have tried to act toward you in a perfectly frank and honorable manner. We showed our hand to Mr. Davis, and offered him every thing we could and certainly don't "back water" now; but we can't submit to transactions of this kind. We would like to hear why you seem to have lost confidence in us. By letting S. T. & Co. pay our draft you don't hurt your case.

Answer.

Yours, etc.,

J. M. MERRIAM & SON."

Here is no intimation that the new draft or the money paid thereon had been diverted or wrongfully converted, and there is no notice of any mistake inducing the payment of the draft, and no demand of any kind.

To this letter Thacher replied under date of May 20, as follows:

"GENTLEMEN — Your favor of the 13th is before me and I do not exactly understand it.

Messrs. S. T. & Co. were overdrawn on our books, say \$6,800; they deposited with me a sight draft on you for \$2,500, which was placed to their credit and they were in-

formed at the time that no check would be allowed against it, but it must go to reduce their overdraft. I had no intention of taking the draft, except to reduce their account.

If you understand the transaction different, I would be pleased to hear from you and we will compare notes regarding it.

Respectfully,

W. W. THACHER, *Cashier.*"

This was a perfectly frank and fair letter, explaining the situation, saying that he did not exactly understand the prior letter which was certainly obscure and confusing, and asking for information in case the writers of the prior letter understood the facts differently from what he stated them. This letter contained no refusal to comply with any demand if one had been made, and no position was taken therein which excused a demand, or precluded the defendant from insisting upon one. This, so far as appears, ended the correspondence between the parties, and the suit followed. It matters not that it is quite probable that the defendant would not have complied with a demand if one had been made, for that does not dispense with the necessity of making one. When a demand is necessary it is not excused by showing that the defendant would not probably have complied if one had been made. And it matters not that the defendant has, upon the trial, contested the plaintiff's right to recover. That has occurred since the commencement of the action, and the plaintiff's right of action must have been perfect when the suit was commenced.

The objection that no demand was made was distinctly taken on the trial, when the plaintiff offered in evidence the first letter, and in defendant's motion to nonsuit the plaintiff at the close of plaintiff's evidence, and again at the close of all the evidence.

We are therefore of opinion that the point we have just considered was well taken. But upon the assumption that the complaint is sufficient and that a proper demand was made we are of opinion that the facts proved did not warrant the verdict ordered.



Here there was no conversion of the draft by the defendant. It was delivered to it by the only persons at the time liable thereon. If the telegram of the drawees be regarded as an unconditional promise in writing to accept the draft it did not bind them as acceptors because the defendant did not receive the draft "upon the faith" of the telegram. (1 R. S. 769, § 8; *Greele v. Parker*, 5 Wend. 414; *Bk. of Michigan v. Ely*, 17 id. 508; *Barney v. Worthington*, 37 N. Y. 112; *Johnson v. Clark*, 39 id. 216.) After the defendant received the draft from the drawers it could hold it against them as drawers and indorsers thereof, and no one could control their dominion over it. The drawees could not have then sued it for the conversion or for the possession of the draft or to restrain any use which it might choose to make of it. After the defendant obtained the draft all it did with it was to present it for acceptance and payment to the drawees, and after payment it delivered the draft, as we must presume, to them. It thus parted with the possession of the draft to them and there was no wrongful conversion of it of which they could complain. And so this case is unlike the case of *Comstock v. Hier* (73 N. Y. 269), which is very much relied on by the learned counsel for the plaintiff. In that case Comstock was the indorser of the note which it was claimed Hier had wrongfully converted, and it was held that Comstock was in such relation to the note that he could sue for a wrongful conversion thereof, or for the proceeds received upon the wrongful conversion thereof. The recovery was there upheld on the theory of a wrongful conversion of the note. But this recovery cannot be upheld upon that theory.

The only other theory suggested for the maintenance of this action is that of mistake, and much can be plausibly and forcibly said in favor of this theory. It is certainly true that if the drawees had known what they now know, or if they had known that the proceeds of the draft were to be applied otherwise than upon the old draft, they would not have accepted or paid the draft. But were they so mistaken that they can reclaim the money voluntarily paid by them? It is not every mistake

that will lay the groundwork for relief. It must be a mistake as to some existing fact, not as to something to happen or to be done in the future. It must be a mistake as to some fact not remotely, but directly, bearing upon the act against which relief is sought. (*Dambmann v. Schulting*, 75 N. Y. 55.) If it were the rule to relieve against mistakes as to remote or what are sometimes called extrinsic facts, great uncertainty and confusion would attend business transactions. Here the draft was genuine, addressed to the drawees, who had authorized it to be drawn, and it was held by the defendant, which could lawfully receive payment thereof. There was no mistake as to the intrinsic facts. The facts that the drawers had not acted in good faith with the drawees, or had placed the draft and its proceeds beyond their control, so that the old draft might not be paid, were too remote. The mistake of the drawees was rather as to the application of the money paid by them — a future fact. If the defendant had received this money and applied it upon the old draft the precise expectation of the drawees would have been met and there would have been no ground of complaint. It is believed that no case can be found which holds that a party paying money, under the circumstances existing here, has been allowed to reclaim it upon the ground of mistake. The defendant's case may rest upon principles decided in the cases of *Justh v. The National Bank of The Commonwealth* (56 N. Y. 478), and *Stephens v. The Board of Education* (79 id. 183). In the *Justh Case* one Gray borrowed plaintiff's checks for \$40,000 upon forged collaterals. He took the checks and had them certified to be good by the drawee bank, and then deposited them with the defendant, which received the money upon them. In that case the plaintiffs clearly parted with their checks under a mistake as to the genuineness of the collaterals. If they had known that they were forgeries they would not have parted with the checks. But upon the assumption that the defendant had parted with no value for the checks, or upon the faith of the checks, this court held that the plaintiffs could not recover the amount of the checks, treating them as money paid to the de-

fendant. The decision was also put upon the ground that the defendant had parted with value for the checks, and thus rests upon both grounds. In the *Stephens Case* one Gill obtained of the plaintiff a sum of money upon the security of a forged mortgage and paid the money to the defendant upon an antecedent debt; and it was held that the plaintiff could not reclaim the money. These decisions and others like them do not rest, as has been sometimes supposed, on the ground that money has no earmark, but upon grounds of public policy. As said by Judge ANDREWS in the *Stephens Case*: "It would introduce great confusion into commercial dealings, if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud," and if the plaintiff in that case had shown that the very money he had loaned to Gill had been delivered to the defendant, the decision must have been the same. In the case of *Gammon v. Butler* (48 Me. 344) the plaintiff gave her husband \$100 in bills, to be by him carried and delivered to her children, and he paid the same money to the defendant upon an antecedent debt, and it was held that, in an action for money had and received, she could not recover, and the decision was based upon the same principles laid down in the cases of *Justh* and *Stephens*. A large share of the business of the world is carried on by means of bills of exchange drawn upon persons liable to pay or for the accommodation of the drawers willing to pay them. They pass from hand to hand by indorsement or mere delivery, and are generally payable at places distant from the places where they are drawn. The "protection and encouragement of trade and commerce," as said in the *Maine Case*, and "considerations of public policy and convenience," and "the security and certainty in business transactions," as said in the *Stephens Case*, require that when such a bill is paid to one who holds it in good faith and for value, he should not be called upon afterward to account for the money paid, perhaps, at a distant time or place after the accounts with the drawers have been settled and closed, upon proof that in transactions between

the drawees and drawers, of which the holder has no knowledge or means of knowledge, there has been some fraud, or wrong, or mistake to the injury of the drawees. If this money can be reclaimed, public policy is just as much contravened as it would be if the money had been drawn from the drawees by the drawers and by them paid to the defendant. If the drawers had received this money from the drawees to pay the old draft and had used it to pay their antecedent debt to the defendant, it is conceded that the drawees could not have reclaimed it. How can it make any difference in principle that the money was paid to the defendant directly by the drawees upon the order of the drawers? Whether the money was paid in the one way or the other, the principles of public policy and convenience lead to the same conclusion.

It matters not that the defendant, not being a holder for value parted with when it took the draft, could not have enforced it against the drawees even after acceptance. That was true in the case of the check in the *Justh Case*. If the defendant in that case had parted with no value at the time it took the checks from Gray, it could not have sued the plaintiffs there as drawers. Yet after the plaintiffs, through the drawee bank, had paid the checks, it could not reclaim the money paid. Here the drawees could have refused to accept the draft, and they might have refused to pay after acceptance, and might probably have successfully defended an action upon the draft. But having paid the draft, they must now look to the drawers who made an improper use of the same, and who in law perpetrated a fraud upon them, and they cannot visit the consequences of that fraud upon the innocent defendant.

It is undoubtedly the rule in this State that one who signs commercial paper for the accommodation of another, for a particular purpose, can defend, when sued upon the paper by a person who took it as security for, or to apply upon an antecedent debt without parting with value at the time, by showing that the paper has been diverted from the purpose intended. This rule is an exception from the general rule of commercial law which protects one taking such paper in good

faith and for value against the equities or defenses of all prior parties to the paper. (1 Pars. on Notes and Bills, 218.) While this exception has been much assailed in other jurisdictions and is not recognized in England, or in the Federal courts, or in the courts of many of the States of the Union, it is believed that it more frequently than otherwise tends to just results. The holder of the paper in such cases is generally soon made aware of the defense, and can take measures to protect himself from harm. But it is carrying the exception one step further to hold that the accommodation signer of such paper can pay it, and then, at any time before the statute of limitations has barred his right, and after time has complicated or changed the relations of the parties, sue to recover back the money thus paid.

The facts seem to disclose another ground of defense to this action. The draft was of value to the defendant. It had the right in any event to hold it and enforce it against the drawers, and the drawees could not reclaim the money paid and at the same time retain the draft. They should, before the commencement of the action, have demanded the money, and tendered back the draft, and it is possible that a tender at the trial would be sufficient. As this point was not made on behalf of the defendant, we will notice it no further and give it no weight in our decision.

In this discussion we have assumed that the defendant took this draft without notice of the purpose for which the drawees authorized it to be drawn. We are justified in this assumption by the undisputed evidence. If the case had been submitted to the jury, and they had found that the defendant had such notice, the verdict would have been so far against the evidence that it would have been the duty of the court, upon application, to set it aside.

Our conclusion, therefore, is that this recovery cannot be upheld, and the judgment should be reversed and a new trial granted.

All concur, except MILLER, J., dissenting; FOLGER, Ch. J., and ANDREWS, J., concurring in result.

Judgment reversed.

## Statement of case.

THE PEOPLE, ex rel. JOHN JOURDAN, Plaintiff in Error, v.  
CHARLES DONOHUE, Justice, etc., Defendant in Error.

The provision of the Federal Constitution (art. 4, § 2), requiring the surrender, on demand of the executive authority of a State, of fugitives from justice "charged with treason, felony or other crimes" who are found in another State, and the provision of the U. S. Statutes giving practical effect thereto (U. S. R. S., 5278), embrace every criminal offense and every act forbidden and made punishable by the law of the State where the act was committed.

Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires.

Both at common law and under the statutes of Connecticut, "theft" is recognized as a crime and as synonymous with "larceny."

Where therefore, to a writ of *habeas corpus*, a warrant of extradition issued by the governor of this State was alone returned, which recited a representation by the governor of Connecticut, that the prisoner stood "charged with the crime of theft" committed in said State, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner "is charged with said crime and with having fled from the said State," and that such papers were certified by said governor to be duly authenticated, *held*, that the warrant fully complied with the statute and sufficiently established the conditions necessary to its issue; that it was not necessary to state therein the facts constituting the alleged crime.

(Argued February 28, 1881; decided March 8, 1881.)

ERROR to the General Term of the Supreme Court, in the first judicial department, to review an order made December 12, 1880, affirming an order of Hon. CHARLES DONOHUE, justice of the Supreme Court, which dismissed a writ of *habeas corpus* issued on behalf of James Jourdan, the relator, and remanded him to custody; which order was brought up for review at General Term by writ of *certiorari*; the order appealed from dismissed said writ.

The relator was in the custody of an agent of the State of Connecticut, who made return to the writ of *habeas corpus*, in substance, that he detained the relator under a warrant issued

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by the governor of this State, of the body of which the following is a copy.

"Whereas it has been represented to me by the governor of the State of Connecticut that John Jourdan stands charged with the crime of theft, committed in the county of Middlesex, in said State, and that he has fled from justice in that State, and has taken refuge in the State of New York; and the said governor of Connecticut having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said John Jourdan to be arrested and delivered to Walter P. Chamberlin and Lyman Smith, who are duly authorized to receive him into their custody and convey him back to the said State of Connecticut.

"And whereas, the said representation and demand is accompanied by affidavits, complaint and warrant, whereby the said John Jourdan is charged with the said crime, and with having fled from the said State, and taken refuge in the State of New York, which are certified by the said governor of Connecticut to be duly authenticated.

"You are, therefore, required to arrest and secure the said John Jourdan whenever he may be found within the State, and to deliver him into the custody of the said Walter P. Chamberlin and Lyman Smith, to be taken back to the said State from which he fled, pursuant to the said requisition."

The relator traversed the return. It appeared that the governor refused to furnish the papers upon which his warrant was issued.

Further facts appear in the opinion.

*Ira Shafer* for appellant. From the executive warrant and the papers annexed hereto — either affidavits or an indictment — must be determined the question whether the detention of the plaintiff in error is lawful. (*The People v. Pinkerton*, 17 Hun, 199; affirmed, 77 N. Y. 245.) In case no papers accompany the executive warrant, the question of the legality of the detention of the plaintiff in error must depend upon the war-

## Statement of case.

rant and the recitals therein. (*People v. Pinkerton*, 17 Hun, 199; 77 N. Y. 245.) It is not enough to charge a crime; the time, place and nature of the crime and its subject-matter should be set out. (3 Whart. Cr. Law, § 2972; *Matter of Francois Farez*, 7 Blatchf. 35; *Matter of Leland*, 7 Abb. [N. S.] 61, 65, 66; *Ex parte Smith*, 3 McLean, 121; *People v. Pinkerton*, 17 Hun, 199, 200, 201; 2 Bouv. L. D., Warrant; *People v. Brady*, 56 N. Y. 182, 190, 191; 2 Hale, 122; 2 Inst. 592; 1 Ld. Raym. 213.) The governor has no general power or authority to issue his warrant for the arrest of citizens of this State in order that they may be sent out of it; he is an officer of limited jurisdiction in this respect, and in the absence of the affidavit or indictment the warrant must recite sufficient to show authority to issue it. (*Ex parte Smith*, 3 McLean, 121; *Solomon's Case*, 1 Abb. Pr. [N. S.] 347; *People v. Pinkerton*, 17 Hun, 199, 201.)

*Samuel A. Noyes* for respondent. The recitals of the warrant of the executive of this State show the existence of every requirement of the Constitution, statutes and acts of Congress affecting the surrender of the relator. (*Matter of Clark*, 9 Wend. 212; *Connors v. Reilley*, 11 Hun, 89; *People, etc., v. Pinkerton*, 17 id. 199; 77 N. Y. 245; *People ex rel. Lawrence v. Brady*, 56 id. 182.) The executive warrant, in describing the offense for which the relator is sought to be extradited as "theft," describes an offense which comes under the statutes of 1793, providing for the extradition of fugitives charged with treason, felony or other crimes. (U. S. Const., art. 4, § 2; U. S. R. S., p. 1027, § 5278; *People v. Brady*, 56 N. Y. 188; *Comm. of Kentucky v. Denison*, 24 How. [U. S.] 66, 99; 4 Bla. Com. 229; *Am. Ins. Co. v. Bryan*, 26 Wend. 563-586; act of 1873, chap. 357; rev. of 1875 of Gen. Stat. of Conn., 537-538, 502, 503.) The court will presume that the proper facts are properly stated in the proper papers which were before the governor when he issued the warrant. (*Matter of Clark*, 9 Wend. 223; 77 N. Y. 245.)



FINCH, J. The sufficiency of the Executive warrant to justify the detention of the prisoner is the sole question raised by the writ of *habeas corpus*, and presented on this appeal. The warrant alone is returned, and, of necessity, furnishes the only authority upon which the proceedings for extradition can rest. These proceedings, as between the several States of the Union, expressly commanded by the Federal Constitution, were regulated and given a practical operation by the act of 1793. (Const., art. 4, § 2; U. S. R. S., § 5278.) They provide for the surrender of persons "charged with treason, felony, or other crimes." The language chosen is broad, and was plainly intended to embrace every criminal offense, and every act forbidden and made punishable by the law of the State where the crime was committed, and whether such by the common law, or express legislative enactment. (*Kentucky v. Dennison*, 24 How. [U. S.] 66.) By the act of 1793, three things are rendered necessary to precede and justify the warrant of extradition. There must be a demand from the governor of the State within which the crime has been committed for the surrender of the fugitive who has fled from its jurisdiction. Such requisition must be accompanied by an indictment, or an affidavit charging the commission of the offense. And such indictment or affidavit must be authenticated by the certificate of the Executive making the requisition. These preliminary conditions are essential. To say they are not would be to disregard the law, and make the Executive an autocrat. If they are essential, their presence or absence in a given case must, of necessity, become the subject of judicial investigation when the judgment of the law is invoked. And hence we have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition. (*People ex rel. Lawrence v. Brady*, 56 N. Y. 182.) Our ruling in this respect has not escaped criticism (*Leary's Case*, 6 Abb. N. C. 44); but an opposite conclusion, which would

make the determination of the Executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment.

Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the Executive, in the exercise of official discretion and authority, we can look, only to the warrant itself, and its recitals, for the evidence that the essential conditions of its issue have been fulfilled. (*People ex rel. Draper v. Pinkerton*, 77 N. Y. 245.) That is the situation of the present case. The warrant recites a representation by the governor of Connecticut, that "John Jourdan stands charged with the crime of theft, committed in the county of Middlesex, in said State;" that the governor of Connecticut has demanded his arrest and extradition; that such representation and demand were accompanied "by affidavits, complaint and warrant, whereby the said John Jourdan is charged with the said crime, and with having fled from the said State;" and that such papers are "certified by the said governor of Connecticut to be duly authenticated." These recitals cover the essential conditions of the law, and establish their existence, unless there is force in the two objections presented for our consideration, and which were argued at least with earnestness and ability.

It is at first questioned whether "theft" is a crime either at common law or under the statutes of Connecticut. The criticism is upon the word. It is claimed not to be the precise equivalent of "larceny," and not to be defined as a crime by the statutes of Connecticut. We do not think either suggestion is well founded. Bouvier defines "theft" as "a popular term for larceny." Blackstone uses the two words synonymously and as descriptive of one and the same offense. He defines "larceny or theft." (Vol. 4, p. 229.) He proceeds to "examine the nature of theft or larceny." (Id. 230.) He speaks of a "prosecution for theft." (Id. 235.) And while discussing the punishment of larceny relates that "our antient Saxon laws punished theft with death if above the value of

twelve pence." (Id. 237.) In *American Ins. Co. v. Bryan* (26 Wend. 563), the meaning of the words "thieves" and "theft" came under discussion, and it was said of the latter that its "primary meaning, which is now the ordinary one, is that of secret stealing, or simple larceny." The statutes of Connecticut equally recognize theft as a crime. Thus it is provided that "when *theft*, shall be committed in one county and the property *stolen* shall be carried into another county, the offender may be tried in either county." (Conn. Gen. Stat. 527, 538.) And burglary is defined to be a breaking and entering "with intent to commit *theft*," etc. (Id. 503.) It is quite evident that, both at common law and under the statutes of Connecticut, theft is recognized as a crime, and is synonymous with larceny, and the recital in the Executive warrant, that Jourdan was charged with theft is quite as effectual as if it had described him as charged with larceny.

But the force of the argument of the learned counsel for the prisoner was not spent on this merely verbal criticism, and took the graver form that the warrant recited, not the facts constituting the offense, but simply the conclusions of the Executive, which might or might not be well founded and accurate, and that such facts should be stated at least with reasonable certainty and precision. The objection involves, as its ultimate result, a requirement that the Executive warrant shall state with reasonable certainty the facts constituting the alleged crime, and that, without such facts, a recital that the person demanded is charged with a crime described simply by its generic name, as murder, larceny or the like, is insufficient. There are several difficulties in the way of such a conclusion. The proceeding is under a specific statute. Compliance with that is all that is necessary. The question is never whether the prisoner is guilty or innocent, whether a crime has been committed or not. Those are later questions, as to which the party arrested, in due season, will have full opportunity to be heard. The question is simply whether he is "charged with crime." The recital in the warrant avers that fact. We must take it as true and cannot require more. If it be said that the state-

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ment of the fact involves, more or less, a conclusion of the Executive, derived from other facts, it must not be forgotten that it is at least a conclusion drawn by the officer to whom the law primarily committed the question. Nor should we fail to observe that the doctrine contended for sets strongly toward an effort to break in upon, and break down, the independent action of the Executive in the performance of official duty. In this case, as in many others, the warrant only is produced, and the papers on which it is founded are withheld. We are to assume that they are withheld in what seems to the Executive the proper performance of official duty. But if the facts contained in the papers must be recited in the warrant, the right or duty, if it exists in the particular case, to withhold such papers is rendered nugatory and vain. The statute contemplated no such purpose. We ought not to be led in that direction. It is enough that the warrant recites what the law requires. We cannot add to it new conditions. The argument founded upon the characteristics of ordinary criminal warrants for the apprehension of persons accused, and of indictments for specific crimes, has no application to the Executive warrant in cases of extradition. At common law it was not necessary, in a criminal warrant for the arrest of the offender, to recite the accusation. (1 Chit. Crim. Law, 41; 1 Archb. Crim. Pl. 107, note 1; *Atchinson v. Spencer*, 9 Wend. 62; *People v. McLeod*, 1 Hill, 398, note *e*.) That was made necessary, in this State, by the statute prescribing the duties and powers of criminal magistrates. (2 R. S., part 4, chap. 2, tit. 2, § 3.) It had no reference to an Executive warrant. Nothing in its inherent nature or the purpose which it subserves requires that it should do more than show, by an explicit statement, that the person arrested is charged with a crime committed in the demanding State. To an ordinary criminal warrant the person arrested is sometimes required to plead. (2 R. S., part 4, chap. 2, tit. 3, § 7.) To an indictment he is always required to plead. In such cases the accusation must be stated with varying degrees of precision. The Executive warrant is of a totally different character. It merely remands an accused person to the juris-

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Statement of case

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diction from which he fled, leaving him there with every right of defense perfect and unimpaired, and no humane or just provision for his protection invaded. We can see no reason why the warrant of the Executive should be required to go beyond a substantial statement of the existence of the conditions necessary to its issue. It was so held in an early case (*In re Clark*, 9 Wend. 222), and which, we think, may be wisely followed. We are of opinion that the Executive warrant, in the present case, fully complied with the statute and sufficiently established the conditions necessary to its issue.

The order appealed from should be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.

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GEORGE DUNFORD, Respondent, v. FREDERICK G. WEAVER,  
Sheriff, etc., Appellant.

Under the provision of the Code of Civil Procedure (§ 426, sub. 3), which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge; when a sheriff has an office in the city or village where the County Courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 R. S. 285, § 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. Where a summons was served upon a sheriff by delivery to his deputy at his office, *held*, that an omission to prove the filing of notice on the trial, if required, was cured by the bringing of the notice to the General Term, on appeal from judgment against the sheriff.

An omission in proof of a matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed.

Under the provision of the act of 1867 (§ 8, chap. 783, Laws of 1867) in relation to Surrogates' Courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts.

## Statement of case.

Where an action is brought against a sheriff for an escape, he cannot set up an error in the process under which the arrest was made which renders it simply voidable, not void.

Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (3 R. S. 221, § 6, sub. 4.)

It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed.

Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*.

Where a sheriff is sued for an escape from custody under such an attachment, the plaintiff is entitled to recover the damages sustained by him (Code of Civil Procedure, § 158), to wit: the sums awarded to him by the surrogate's decree, with interest from its date.

The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial. *Held*, that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provision of the Code of Civil Procedure (§ 158) in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient.

In such an action the fact of the insolvency of the debtor is no defense.

The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which on payment were assigned to plaintiff. *Held*, that this was not a payment and extinguishment of the claims.

Two attachments were issued by the surrogate and arrests made before said Code went into effect; the escape occurred thereafter; it was claimed that the provision of the Code did not apply. *Held* untenable, as the cause of action was, not the issuing of process and arrest, but the escape.

(Argued February 10, 1881; decided March 8, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Tuesday of June, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 21 Hun, 349.)

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Statement of case.

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This action was against defendant, as sheriff of the county of Oneida, for an alleged escape of one John Tillinghast, who had been received into his custody, under four several final precepts or mandates issued by the surrogate of Oneida county, in a proceeding originally commenced by John Boyle, as a creditor of one Ross Taylor, deceased, and of whose estate the said John Tillinghast had been appointed administrator, with the will annexed.

One Matthew M. Parker, a surety on the bond of the said John Tillinghast, as such administrator, had presented his application to the surrogate, setting forth that he desired to be relieved from responsibility for the further acts or defaults of the said John Tillinghast, as such administrator, and Tillinghast had been cited to appear before said surrogate and give new sureties; he appeared, in pursuance of the citation, but neglected to give new sureties, whereupon the letters of administration were revoked by the said surrogate. The application of Boyle was made for the purpose of compelling an account of the said Tillinghast, as late administrator. Pending this proceeding, Tillinghast filed with the surrogate a petition for a general accounting, and the same was referred to an auditor, to examine and report thereon. The auditor made and filed his report, which was affirmed by the surrogate, and a final decree made, whereby Tillinghast, as such administrator, was personally charged with certain moneys shown to be in his hands. On the footing of this decree, four precepts were issued to defendant, the sheriff of Oneida, in favor of four creditors of the deceased, for the several sums found to be due them, and reciting the said final decree, that the said sums had been personally demanded of Tillinghast, and that he neglected and refused to pay the same; they respectively commanded the sheriff that he take the body of said Tillinghast, if found in his bailiwick, and commit him to the common jail of his county, and detain him in his custody until he should pay the several sums named in the several precepts. These amounts were indorsed on the precepts, respectively, with directions to collect the same with interest and costs. By virtue

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thereof, defendant arrested said Tillinghast, and took from him bail for the jail limits. The complaint alleged that defendant wrongfully permitted the escape. On the trial, the plaintiff, after proving the decree made by the surrogate, and also the four precepts with the return of the sheriff thereon, and proving the extent of the jail limits for Utica, gave proof tending to show that on the 23d of August, 1879, the said Tillinghast went beyond the jail limits, and that this suit was commenced before his return to the limits.

The action was commenced by delivery of the summons to the sheriff's deputy and clerk, in a room claimed to be the office of the sheriff, under subdivision 3 of section 426 of the Code of Civil Procedure. The sheriff was called by the plaintiff as a witness and testified that the place where the service was made was his official office. It did not appear on the trial that a notice designating his office had been filed with the county clerk. Upon the argument of the appeal at General Term, plaintiff produced a duly certified copy of the notice as filed.

The further material facts appear in the opinion.

*C. D. Adams* for appellant. A suit against the sheriff must be actually commenced while the prisoner is off the limits. (3 R. S. [6th ed.] 722, § 85; Crocker on Sheriffs, § 592; new Code, §§ 160, 161, 171.) The sheriff must have an office. He must designate it by filing a notice in the county clerk's office. If no notice is filed, the county clerk's office is his office. (Crocker on Sheriffs, § 23; 3 R. S. [6th ed.] 447, §§ 44, 46.) Before the new Code was amended in 1879, a suit could only be commenced against the sheriff by personal service of the summons. (16 Abb. [N. S.] 396; new Code (original act), § 426, sub. 3.) The surrogate's decree was void; he had no jurisdiction of the proceeding, and the process under it was void; this is a good defense to the supposed escape. (2 Abb. Dig. 786, No. 74; 1 Hill, 118; 7 id. 35; 1 Keyes, 510.) A creditor can only call to account the executor or administrator actually in office. (2 R. S. 92, § 522; art. 3, title 3, ch. 6, part 2 [6th ed.],



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3 R. S. 99, § 63; R. S. § 82 [5th ed.], §§ 68, 69, 83; Laws of 1837, ch. 460, p. 524, § 36; Dayton on Surr. [3d ed.] 650; Redf. Law and Pr. 365; ch. 229, Laws 1862.) The surrogate had no power to charge Tillinghast personally with auditor's fees, they must be paid out of the estate. (3 R. S. [6th ed.] 102, § 78; 2 id. 94, § 64.) The surrogate had no power to decree that, personally, Tillinghast "also pay the sum of \$150, as payment toward the costs of such compelled accounting and proceedings." (8 Weekly Dig. 544, Ct. Appeals; 52 N. Y. 661; 26 id. 441; 1 Barb. Ch. 91; 39 Barb. 172.) Unless the surrogate acquire jurisdiction of the subject-matter, there can be no valid decree. (6 Paige, 95-98.) Where there is jurisdiction of the subject-matter, appearance, consent or waiver will add jurisdiction of the person but consent will not cure want of jurisdiction of the subject-matter. (3 Cai. 129; 1 Hill, 343; 3 Com. 9; 2 Ker. 156; 47 N. Y. 67-72; 49 id. 303-309; 4 Keyes, 136-150; 42 N. Y. 317-327.) If the decree was void, there could be no contempt in disregarding it — no attachment to enforce it; that can only be done in case of lawful orders. (45 Barb. 344, 346; 3 R. S. [6th ed.] 327, § 10, sub. 4; 2 R. S. 222, § 6.) The complaint is for a voluntary escape. (3 Johns. Cas. 73; 4 Bosw. 391-403, 404.) Tillinghast was lawfully upon the limits if the decree and attachments were valid. (5 Lans. 466; 69 N. Y. 536; 18 Hun, 64.) No action of debt can lie in this case; Tillinghast was not arrested "in execution in a civil action." (3 R. S. [6th ed.] 722, § 84; 2 id. 437, §§ 83, 84.) The only action maintainable is "an action of trespass on the case to the extent of the damages sustained by him." (3 R. S. [6th ed.] 722, § 83; 2 id. 437, § 62; 3 Abb. Pr. 86.) The plaintiff may elect to proceed under the statute, when his case is within it, or at common law for damages; when he has elected, he is bound by his election. (17 Wend. 543; 15 Abb. 113, affirming 10 id. 12; 31 N. Y. 255, 257; 44 id. 162, 165; 4 Bosw. 391; 3 R. S. [6th ed.] 722, § 84; 4 Bosw. 391, 401; 3 R. S. [6th ed.] 839, § 4.) The new Code does not change the law as to proceedings in Surrogate's Court. (New Code, §§ 151-171.) The rights and liabilities, claims and demands of the sheriff, prisoner

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and plaintiff were fixed, when these arrests were made. They cannot be enlarged by any subsequent change in the law. (New Code; *Randall v. Sackett*, 77 N. Y. 480.)

*S. M. Lindsley* for respondent. This action is authorized by section 158 of the Code of Civil Procedure. (Code of Civ. Proc., § 481, subd. 2.) Even if the complaint did allege a voluntary escape, it would be of no avail to the defendant, for "if the allegation is a voluntary escape, a negligent escape may be proved." (3 Wait's Actions and Defenses, 226; *Skinner v. White*, 9 N. H. 205.) The service of the summons proved was in strict compliance with the provisions of the statute. (Code of Civ. Proc., § 426, subd. 3, as amended in 1879; 4 Wait's Pr. 232.) Upon a creditor's petition a surrogate can compel a removed administrator to account, and in that proceeding can make a decree directing him to pay money found in his hands over to creditors. (*Gerould v. Wilson*, 22 Alb. L. J. 353; 10 N. Y. Weekly Dig. 563; 2 R. S. 92, § 52; id., 95, § 91; Laws of 1837, § 36, chap. 460, as amended by § 10, chap. 229, Laws of 1862.) The precept or mandate being regular on its face the sheriff was bound to execute it. (*Hutchinson v. Brand*, 9 N. Y. 210.) The defendant, the sheriff, cannot avail himself in an action for an escape, of any error in the decree or in the process issued to enforce it. (*Cable v. Cooper*, 15 Johns. 155; *Jones v. Cook*, 1 Cow. 309; *Hinman v. Brees*, 13 Johns. 529; *Bissell v. Kip*, 5 id. 89; 8 Cow. 192.) Plaintiff was entitled to recover interest. (*Hodges v. Cooper*, 43 N. Y. 216; *Chouteau v. Suydam*, 21 id. 185; *Sears v. Conover*, 3 Keyes, 113; 78 N. Y. 393-400; *Dinenny v. Foy, Sheriff*, 38 Barb. 18; *Townsend v. Whitney*, 75 N. Y. 425; 15 Hun, 93.) Evidence of the prisoner's insolvency was properly excluded. (Code of Civ. Proc., § 158; *McCreary v. Willett*, 23 How. 129; *Barnes v. Willett*, 35 Barb. 514.)

FOLGER, Ch. J. 1st. It is contended by the defendant that there was not a service of the summons in this case, while the debtor was off the jail liberties. What-

ever was done toward a service was done while the debtor was beyond the liberties. The act relied upon by the plaintiff as a service, was the delivery of the summons to a deputy and clerk of the defendant at a room, which was, in fact, the office of the defendant as sheriff. The Code, section 426, subdivision 3, makes that a good service, if that room was the office of the defendant as sheriff, in view of law. It is the duty of the sheriff to keep an office in the city or village in which the County Courts are held: and that he shall notify of the place by filing notice in the county clerk's office. (2 R. S. 285, § 55.) No proof was given on the trial that the defendant had filed a notice; but, as above intimated, he did, in fact, in that room, keep an office that met the view of the statute. Thus it appeared that he, in part, did the duty the law put upon him. He kept an office. If the other part of the duty was left undone, that would not undo that which he had done. There was still the office kept as bidden by the statute. Had it been shown that he had filed a notice of some other room or place, as his office under the statute, it might well be said that the room at which the summons was left was not the office. But keeping that room as his office, he cannot, by omitting to file notice thereof, debar a suitor of his right to serve a summons upon him by leaving it there. That would be to take advantage of his own breach of duty. The filing of notice is not needed or required to make the room the office. It is to give the public to know that it is the office. It is made the office by the act of the sheriff. The notice is but the making known of the act. And the omission of notice does not undo the act, or shield the sheriff from the effect of it. We think that the summons was shown to have been lawfully served.

Besides that, the bringing of the notice to the General Term cured the omission at the trial, if there was one. To sustain a judgment, an omission in proof may be supplied on appeal, if matter of record will do it that cannot be answered or changed.

2d. It is contended that the decree of the surrogate was void

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for want of jurisdiction. And first, it is said that there was no power to charge the administrator personally with the auditor's fees, and that they must be paid out of the estate. So, indeed, is the provision of the Revised Statutes (2d vol. 94, § 64), if that stood alone. That section gives authority to appoint auditors and to pay them out of the estate. But there is another provision of statute enabling a charge of their fees elsewhere. The Laws of 1867 (chap. 782, § 8) provide that an administrator, compelled to render an account, may be charged personally with the costs of the proceeding. The sum of \$150, charged against the administrator personally, toward the costs of the proceeding, falls within the same statutory provision.

3d. It is claimed that the process by which the debtor was arrested is void. The particular in which it is said to be so is that collection could be made only by a precept, under 2 R. S. 535, § 4, and that it could not issue until proof by affidavit of a personal demand of the money and a refusal to pay it. The process in the case in hand recites that the Surrogate's Court has been informed that a personal demand has been made and refusal given. If the process is erroneous, it is voidable only, and not void, and such defects the sheriff cannot set up. (*Cable v. Cooper*, 15 Johns. 155.) But where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (2 R. S. 221, § 6, subd. 4; *Seaman v. Duryea*, 11 N. Y. 324.) It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; as it is enough if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, and states in substance the cause for arrest and specifies the act or duty to be performed. (Id.)

4th. The attachment issued by the surrogate directed the collection of interest on the decretal sums named in it. It is urged that the surrogate had no power to direct the collection of interest. If it be granted that he had not, the insertion in the attachment of a direction to collect interest did not vitiate the process *in toto*. The commands to collect the principal

sums and the interest on them were easily separable, and the error would not render the process void. When the sheriff is sued for an escape from custody on that process the question is changed, and it is what may the plaintiff recover of the defendant? Every judgment shall bear interest from the time of perfecting the same. (Laws of 1844, p. 508, chap. 324, § 1; old Code, § 310; new Code, § 1211.) This means, every determination of a court awarding a sum of money to one party, to be paid by another party. By virtue of those provisions of law the decree of the surrogate bore interest from its date. The parties interested in it were entitled to have from the debtor the sums awarded to them and interest thereon. If such debtor, in custody of the sheriff, goes beyond the liberties of the jail without the assent of the party, the sheriff is answerable to the extent of the damages sustained by the party. (New Code, § 158.) *Prima facie*, that extent is what the party could have exacted of the debtor; and that is the sum awarded, with interest. If the plaintiff had cause of action against the defendant, he was entitled to the verdict for the principal sum and interest.

5th. It is further urged that the complaint avers that the defendant wrongfully permitted the debtor to escape and go at large out of his custody. There was no proof that the defendant was assenting to or knowing of the going off the liberties by the debtor. The proof is that the defendant was away from the liberties, and that the transgression of the debtor was but little more than momentary, for a short distance, and without the knowledge of the sheriff. It is now urged that the complaint is for a voluntary escape, which the proofs do not make out, and that the motion for a nonsuit, based upon that ground, should have been granted. If the old rules of pleading and the old distinctions of causes and kind of action still maintained, this might be so. But the former have been for some time supplanted, and the last Code brings into one phrase all causes of action for an escape. Its language is: "Where a prisoner, in a sheriff's custody, goes or is at large beyond the liberties of the jail, without the assent of the party at whose

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instance he is in custody, the sheriff is answerable therefor in an action against him." (§ 158.) The cause of action is simply the going or being at large beyond the liberties. Whether negligently or voluntarily on the part of the sheriff matters not, either with the cause of action or the form of it. The existence of that fact gives the right to an action. If the complaint fully apprises the defendant that such is the cause of action relied upon, it is enough. It does here.

6th. It is claimed that the fact of the insolvency of the debtor is a defense to the sheriff. This was so at common law, perhaps. (*Patterson v. Westervelt*, 17 Wend. 543.) Here, again, we are under the Code, § 158, subd. 2: "If the prisoner was in custody by virtue of any other mandate, after judgment, the sheriff is answerable for the debt, damages or sum of money for which the prisoner was committed." The facts of the case bring it within this clause.

7th. The debtor gave a bond as administrator. Parker was one of the sureties. It seems that a creditor of the estate got judgment on the bond against Parker. Parker furnished money to his counsel, with the understanding and for the purpose of buying the claims against the administrator, and on the payment of the money the claims were assigned to the plaintiff in this action. On that state of facts the defendant moved for a nonsuit, on the ground that the claim was extinguished; and we think that the nonsuit was properly refused. The defendant also requested the court to leave it to the jury whether Parker paid the claims of any of them before they were assigned, and to direct the jury that if they so found, that as to such claims the decree was satisfied. We think that the testimony is too plainly, to the result, that the purpose and action of Parker was to obtain an assignment of the claims, and not to pay them, to warrant a verdict otherwise.

8th. Two of the attachments were issued and two arrests made before the new Code. It is claimed that it does not apply to those cases. But the issuing of process and the arrests were not the cause of action. The going off the liberties gave the right of action. That arose after the new Code.

## Statement of case.

This is a hard case for the defendant. We would not have been sorry had we found that he had a legal defense to this action, and a point well taken for a new trial. We have found none.

The judgment should be affirmed.

• All concur, except RAPALLO, J., absent.

Judgment affirmed.

JOHN LOFTUS, Administrator, etc., Appellant, v. THE UNION FERRY COMPANY OF BROOKLYN, Respondent.

While a ferry company is bound to use the strictest diligence in providing suitable and safe accommodation for landing passengers from its boats, it is not bound to so provide against any possibility of danger that they can meet with no casualty.

Defendant landed passengers from its ferry boats by means of a float or bridge, between each side of which and the adjoining pier was a space of from eight to twelve inches, left for the movement of the bridge under the action of the tide and the impact of the boats on entering the slip. On each side was a guard, with a sill along the outer line of the passage-way rising six or eight inches from the floor of the bridge which was spanned by an arched rail, at the center about three feet above the sill, supported by stanchions in the sill about six feet apart. Between the sill and this rail was another rail twenty or twenty-two inches above and parallel with the sill. Plaintiff's intestate, a child six years old, while leaving one of defendant's boats, in passing over this bridge, fell through one of the openings in the guard into the water and was drowned. In an action to recover damages it appeared that the bridge had been constructed five or six years before the accident and was similar to bridges at other ferries of the defendant over which millions of people passed annually and no similar accident had previously happened. *Held*, that defendant was not chargeable with any actionable negligence; and that a verdict for plaintiff was properly set aside.

(Argued February 28, 1881; decided March 8, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made September 14, 1880, which reversed an order denying a motion for a new trial and granted a new trial. (Reported below, 22 Hun, 33.)

## Statement of case.

This action was brought to recover damages for alleged negligence causing the death of James M. Loftus, plaintiff's intestate.

The facts are set forth sufficiently in the opinion.

*Charles J. Patterson* for appellant. He who has what is more than ordinarily dangerous must use more than ordinary care to prevent injury to others thereby. (1 Thompson on Negligence, 238; *Morgan v. Cox*, 22 Miss. 373; *Castle v. Duryea*, 2 Keyes, 169.) The fact that the opening was adjacent to the passage-way, and that it was concealed from the view of a person thereon, imposed upon defendant the duty of additional caution. (*Totten v. Phipps*, 52 N. Y. 354; *Pickard v. Smith*, 100 C. L. [10 C. B. N. S.] 470; *Chapman v. Rothwell*, 96 id. [El., Bl. & El.] 168; *Johnson v. Bruner*, 61 Penn. St. 58; *Indermauer v. Dames*, L. R., 1 C. P. 274; *S. C.* affirmed, L. R., 2 C. P. 311; *Chicago v. Major*, 18 Ill. 338; *Radway v. Briggs*, 37 N. Y. 256.) Persons maintaining openings adjacent to or upon traveled ways are held absolutely responsible for all injuries caused thereby to others using care. (*Barnes v. Ward*, 6 Man., Gr. & Scott, 392; 9 C. B., E. C. L. 418; 14 Jurist, 434; *Copland v. Hardigham*, 3 Campb. 398; *Jarvis v. Dean*, 3 Bing. [11 E. C. L.] 447; *S. C.* affirmed, 11 J. B. Moore [22 E. C. L.], 354; *Beck v. Carter*, 68 N. Y. 283; *Temperance Hall v. Giles*, 33 N. J. Law, 260; *Sexton v. Zett*, 44 N. Y. 430; *Hulbert v. N. Y. C. R. R.*, 40 id. 145.) The fact that many little children were among the great numbers who thronged the passage was reason for providing better protection. Increased care is always due from a carrier to a young child. (*Sheridan v. B. & N. R. R.*, 36 N. Y. 39; *Smith v. Wilson*, 31 How. 272; 2 Wait's Act. and Def. 96; *Hazman Case*, 50 N. Y. 60; 79 id. 469; *N. J. R. R. v. Palmer*, 33 N. J. Law, 93.) The duty of extraordinary care also resulted from the defendant's relation as common carrier of passengers. (*Payne v. Gt. North. R. R.*, 2 Foster & Fin. 619; *Withers v. N. K. R. R.* 27 L. J. [Exch.] 417; *Bird v. Gt. North. R. R.*, 28 id. 417;



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*Richardson v. Gt. E. R. R.*, L. R., 10 C. P. 490; *Knight v. Portland S. & P. R. R.* 56 Me. 234; *Weston v. N. Y. E. R. R.*, 73 N. Y. 595; 38 Mich. 517.) Defendant was bound to provide a safe landing. (*Hoffman v. N. Y. C. R. R.*, 75 N. Y. 605; *Weston v. N. Y. El. R. R.*, 73 id. 595.) Defendant was bound to provide all protection against this danger which would suggest itself to a very careful person having his mind bent upon protecting young children from falling into the opening. (Abb. Trial Evidence, 591; *Bevier v. D. & H. C. Co.*, 13 Hun, 254.) The question as to the sufficiency of the hog frame as a guard is, upon its face, a question of fact. (*Stackus' Case*, 79 N. Y. 464; *Weber's Case*, 58 id. 451; *Ernst's Case*, 35 id. 9; *Leishman v. L. B. & S. C. R'way*, 23 L. T. [N. S.] 712; Fisher's Ann. Dig. 1871, p. 242; *D. L. & W. R. R. v. Napley*, 90 Penn. St. 135.)

Whether the defendant had performed its obligation to guard the opening with such care as it was bound to exercise, was a question of fact for the jury. (*Camp v. Wood*, 76 N. Y. 92; *Hulbert v. N. Y. C. R. R.*, 40 id. 145; *Stratton v. Staples*, 59 Me. 94; *Brockway v. Lascalla*, 1 Edm. 138; *Simson v. L. G. O. Co.*, L. R., 8 C. P. 390; *Lax v. Darlington*, L. R., 5 Exch. 28; *Nicholson v. L. & Y. R. R.*, 3 Hurlst. & C. 533; *Longmore's Case*, 19 C. B. [N. S.] 183; *Martin v. G. N. R. R.*, 16 C. B. 179.) Defendant was obliged not only to use its own best skill and judgment to protect its passengers, but it was bound to avail itself of the skill of others and provide the best guard that was in practical use anywhere. (*Caldwell v. N. J. S. Co.*, 47 N. Y. 282; *Steinweg v. Erie R. R.*, 43 id. 126; *Bevier v. D. & H. C. Co.*, 13 Hun, 253; *Unger v. Forty-second Street R. R.*, 51 N. Y. 497.) Defendant was bound to use the utmost diligence to maintain order among its passengers and prevent injury to one by another. (*Putnam v. Broadway R. R.*, 55 N. Y. 108; *Flint v. Nor. & T. Y. T. Co.*, 34 Conn. 554; *Pittsbg. R. R. v. Hinds*, 53 Penn. St. 512; *Same v. Pillow*, 76 id. 510; *N. O. R. R. v. Burke*, 53 Miss. 200; *Holly v. Atlanta St. R. R.*, 7 Ga. 460; *Goddard v. Gt. T. R. R.*, 57 Me.

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202; *Hendricks v. Sixth Ave. R. R.*, 12 J. & S. 8; Leading article, 10 Ont. L. J. 41.) The fact that the accident never happened before is immaterial in this case. (*Longmore's Case*, 19 C. B. [N. S.] 183; *Lewis v. Smith*, 107 Mass. 344; *Temperance Hall v. Giles*, 33 L. J., 260; *Wilson v. City of Syracuse*, 21 Hun, 411.) The child not having been guilty of any thing which would be negligence in an adult, the question as to whether his mother was negligent is not in the case. (*McGarry v. Loomis*, 63 N. Y. 105.) She had a right to assume that the defendant had made the bridge safe. (*Newson v. N. Y. C. R. R.*, 29 N. Y. 383; *Weed v. Vil. of Ballston*, 76 id. 329; *N. J. R. R. v. Palmer*, 33 N. J. Law, 90.) Whether it was negligence to allow the child to go in advance of her, under the circumstances, was matter of fact for the jury. (*Tetter v. N. Y. & Harlem*, 2 Abb. Ct. of App. Dec. 458; *Ihl v. Forty-second St. R. R.*, 47 N. Y. 317; *Cosgrove v. Ogden*, 49 id. 255; *McGarry v. Loomis*, 63 id. 105.)

*B. D. Silliman* for respondent. Plaintiff must affirmatively prove that there was no negligence on the part of the deceased or of the person having him in charge. (*Deyo v. N. Y. Cent. R. R. Co.*, 34 N. Y. 9; *Reynolds v. N. Y. Cent. R. R. Co.*, 58 id. 250; *Thurber v. Harlem, etc., R. R. Co.*, 60 id. 333; *Waite v. North-eastern R. R. Co.*, 5 Jur. [N. S.] 936.) Defendant was not an insurer of the safety of plaintiff's intestate, but was only bound to provide accommodations for the landing of its passengers which were reasonably safe and sufficient when used in a reasonable way. (*Rigg v. Manchester, etc., R. R. Co.*, 12 Jur. [N. S.] 525; *Cornman v. Eastern Co. R. R. Co.*, 4 H. & N. 781; *Crafter v. Metropolitan R. R. Co.*, L. R., 1 C. P. 300; *Blackburn v. London R. R. Co.*, 17 W. R. 769; *Lay v. Midland R'way Co.*, 30 L. T. 529; *Dugan v. Champlain Tr. Co.*, 56 N. Y. 1; *Cleveland v. N. Y. Stmbt. Co.*, 68 id. 306, 309; *Crocheron v. North Shore Staten Island R. R. Co.*, 56 id. 656; *Hegeman v. Western R. R.*, 13 id. 9; *Caldwell v. N. J. Stmbt. Co.*, 47 id. 282; *Crafter v. Metropolitan R'way Co.*, L. R., 1 C. P. 300; *Lay v. Mid-*

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*land R'way Co.*, 30 L. T. 529; *Blackman v. London, etc., R. Co.*, 17 Wkly. Rep. 769; *Cornman v. Eastern Counties R. Co.*, 4 Hurlst. & N. 781; *Cleveland v. N. Y. Stmbt. Co.*, 68 N. Y. 806.)

ANDREWS, J. The charge of negligence is based solely upon the alleged insufficiency of the guard on the side of the bridge or float adjoining the passage-way for passengers going upon or leaving the ferry-boat. It is not claimed that the bridge was not in other respects properly constructed. It did not fill the entire space between the piers. On each side there was a space open to the water of from eight to twelve inches between the bridge and the adjoining pier. This space was left for the movement of the bridge caused by the tides and the impact of the boat on entering the slip. The guard was a frame of wood constructed by laying a sill lengthwise of the bridge along the outer line of the passage-way and rising six or eight inches above the floor of the bridge, and spanned by an arched rail extending from end to end, which at the center was about three feet above the sill, with stanchions in the sill about six feet apart, and intermediate the sill and the arched rail was another rail parallel with the sill and about twenty-two inches above it. This left a space in the guard above the sill six feet wide and twenty-two inches high. The bridge was constructed five or six years before the accident, and was similar to the bridges at the other ferries of the defendant. It was conceded on the trial that over forty millions of people passed annually over the defendant's ferries, and until the occurrence in question no accident had happened from any person falling or getting through the spaces in the guard. The intestate was a child six years old. On the evening of July 3, 1878, the intestate's mother with her two children (the youngest, an infant, nineteen months old), entered the defendant's ferry-boat at Brooklyn to go to New York, and on reaching the New York side of the river, after the boat had been secured and after most of the other passengers had left the boat, she started with her children to pass over the bridge. The intestate

walked in front of or near his mother, who had the other child in her arms. In some manner not clearly explained, the boy fell into or got through the opening in the guard, and falling into the water between the bridge and the pier, was drowned. The evidence perhaps justifies the inference that the child, frightened and startled by the boisterous noise and the running of two other boys who were leaving the boat, tripped or stumbled over the sill, and falling toward the pier, was precipitated into the water.

We think this case is governed by the cases of *Dougan v. Champlain Trans. Co.* (56 N. Y. 1), *Crocheron v. North Shore Staten Island Ferry Co.* (id. 656), and *Cleveland v. New Jersey Steamboat Co.* (68 id. 306).

The defendant was bound to provide suitable and safe accommodations for the landing of passengers. The rule of the strictest diligence in this respect is the only one consistent with a due regard to the value of human life and with the relation which the defendant assumes to the public. But the rule does not impose upon the defendant the duty of so providing for the safety of passengers, that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard, that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child or even a man to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty. If the structure was intrinsically insecure, the fact that it had been used without in-

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jury before this would not exempt the company from responsibility, when an accident did happen from its defective condition. The guard was concededly sufficient for grown people. A small child might more easily get through the opening than a man, but small children are usually in charge of parents or guardians; and this is entitled to some weight in determining the question of the company's negligence. We think the exemption of the defendant in this case rests upon the fact which we think clearly appears as an inference from the other facts, that the company had no reason to apprehend an accident like this, and that the arrangements made were such as experience had, up to that time, shown to be safe and suitable, and sufficient to meet the requirements of its duty. The line which separates a pure misadventure resulting in injury, for which no one is responsible, from accidents creating responsibility, by reason of negligence, is often narrow and difficult to be drawn; but we think the casualty in this case is of the former and not of the latter class. It results from these views that the defendant was not liable, and that the verdict was properly set aside. The order of the General Term should be affirmed and judgment absolute ordered for the defendant on the stipulation.

All concur, except RAPALLO, J., absent.

Order affirmed and judgment accordingly.

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WILLIAM W. RIDER, Appellant, v. JOHN H. BAGLEY, Jr., impleaded, etc., Respondent.

By the appointment of a receiver in a foreclosure suit the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them.

*It seems* that, assuming the court has power to compel such owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here.

So, also, where fraud or contempt upon the Supreme Court is charged upon

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the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court.

(Argued March 1, 1881; decided March 8, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made November 23, 1877, which affirmed an order made at a Special Term, denying the motion of the plaintiff that the defendant, "John H. Bagley, Jr., pay or deliver over to James T. Olwell, receiver appointed herein, the rents and securities collected and received by himself, or his agent or agents, of Nichols & Pennoyer, or either of them, for rent of the premises described in the complaint as the dock property, or the equivalent of such rent or securities in money." (Reported below, 12 Hun, 17.)

This action is brought by the plaintiff to foreclose two mortgages executed by the defendants, David Vrooman and wife, on lands in Athens, Greene county.

The complaint alleged that the mortgaged premises were insufficient to pay the mortgages, after payment of the prior valid liens thereon; that Vrooman and all persons personally liable for the mortgage debt are insolvent; and that the plaintiff has not adequate security for his debt; that Vrooman had, about six months previous, been adjudicated a bankrupt under the laws of the United States; and that the defendant, John H. Bagley, Jr., was his assignee in bankruptcy, and, as such assignee, and by virtue of an assignment in bankruptcy to him, he was invested with all of the mortgaged premises and the equity of redemption thereof; that the defendants, Nichols & Pennoyer, are in possession of the premises described in the mortgage, under leases to them by Vrooman.

The complaint asked, among other things, "that a receiver of the rents and profits of all the mortgaged premises mentioned in said mortgage to said plaintiff be appointed by this court during the pendency of this action."

No answer or demurrer to the complaint was interposed by any of the defendants.

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Judgment of foreclosure was granted on the 17th day of February, 1875; at the same time and place an order appointing James T. Olwell receiver was granted. The motion for the receiver was made on the 15th February; Bagley appeared by counsel and asked for a postponement, which was granted until the 17th. On the 16th Bagley collected rents, which are those in question. The receiver's bond was approved and filed the 19th of February. A copy of the order appointing the receiver was served on Mr. Bagley March 8, 1875.

*J. A. Griswold* for appellant. The court had power to order the repayment, by Bagley to the receiver, of the rents collected, to reimburse the plaintiff for the consequence of the delay caused by Bagley in postponing the motion for an order appointing a receiver. (*Bank of Utica v. French*, 3 Barb. Ch. 294-303; *Ferguson v. Kendall*, id. 620; *Bank of Plattsburg v. Platt*, 1 Pai. 464; *Thomas on Mortgages*, 304.) The proceeding by defendant was very near a contempt of court, for which the plaintiff might have been compensated. (*Osborn v. Tenant*, 14 Ves. 136; *Hull v. Thomas et al.*, 3 Edw. Ch. 236-8.) This plaintiff had the right, at any time after action commenced, to an injunction enjoining this defendant from collecting these rents, that they might be applied to pay the mortgage debt. (*Post v. Dorr*, 4 Edw. Ch. 412; *Aster v. Turner*, 11 Pai. 436; *Howard v. Ripley*, 10 id. 43; *Clark v. Bradbury*, 3 Keyes, 15, 16; *Van Alstyne v. Cook*, 25 N. Y. 495-6; *Baker v. Townsend*, 31 id. 637-8; *Augustine v. McFarlane*, U. S. Dist. Ct. in Bankruptcy, 1 N. Y. Weekly Dig. 318; *Post v. Dorr*, 4 Edw. Ch. 412; *Hays v. Dickson*, 9 Hun, 227.) The owner of the equity of redemption having delayed the proceedings for the appointment of a receiver, so that he could and did collect the rents before the receiver was appointed, may be directed to pay the rents received by him, or so much as is necessary to pay the deficiency. (*Thomas on Mortgages*, 304; *Bank of Plattsburg v. Platt*, 1 Pai. 464; *Bank of Utica v. French*, 3 Barb. Ch. 293; *Ferguson v. Kimball*, id. 616.) The claim made by the defendant, that because

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he was an assignee in bankruptcy he need not answer in the State court and is not bound by its action, though made a party and called upon to answer, is untenable. (*Eysler v. Gaff*, 13 Alb. L. J. 272, 274.)

*J. A. Hallock* for respondent. The order is not appealable. (Wait's Pr. 465; 59 N. Y. 359; *Wallace v. Castle*, 68 id. 370; *Eq. L. Ins. Co. v. Stevens*, 63 id. 341; *Dunlop v. Patterson Fire Ins. Co.*, 74 id. 145; *Lawrence v. Farley*, 73 id. 187.) Plaintiff is not entitled to the rents sought, because his complaint does not demand them, and the judgment could not (no answer being interposed), and does not adjudge that the plaintiff is entitled to them. (Code, §§ 142, 275; *Andrews v. Monilaws*, 8 Hun, 65; *Simonson v. Blake*, 12 Abb. 331; 20 How. 484.) Bagley, assignee in bankruptcy of David Vrooman, was the owner of the land and entitled to its possession, and to receive the rents and profits of it so long as he continued such owner, subject only to the power of the court to appoint a receiver of such rents and profits during the pendency of such action. (*Mitchell v. Bartlett*, 51 N. Y. 447; *Ins. Co. v. Stebbins*, 8 Pai. 565; 5 id. 38; 4 Sandf. Ch. 405; *Syracuse City Bk. v. Pullman*, 31 Barb. 201; *Comstock v. Drohan*, 71 N. Y. 9; *Hayes v. Dickinson*, 9 Hun, 277; *Lockwood v. Fawcett*, 17 id. 147; *Schofield v. Doscher*, 10 id. 582; *Equitable L. Ins. Soc. v. Stevens*, 63 N. Y. 341; 10 Hun, 584; *Cook v. Grant*, 1 Pai. 407; *Argall v. Pitts*, 78 N. Y. 242-3; *Am. Bridge Co. v. Herdelback*, 4 Wkly. Dig. 291; 4 Kent's Com. 165.) The receiver in a proper case can only collect rents which have not been collected. (Thomas on Mortgages, 300; *Mitchell v. Bartlett*, 51 N. Y. 447; *Astor v. Turner*, 11 Pai. 430; *Clason v. Corley*, 5 Sandf. 447; *Howell v. Ripley*, 10 Pai. 43; *Post v. Dow*, 4 Edw. 412; *Loftsky v. Maujer*, 3 Sandf. Ch. 69; *Argall v. Pitts*, 78 N. Y. 239.) In a foreclosure suit, until the deed is delivered, the rights between the mortgagor and those claiming under him as tenants are not changed. The mortgagor or his assignee retained the right of possession and the consequent right to receive the rents of the mortgaged prem-



Opinion of the Court, per EARL, J.

ises. (Thomas on Mortgages, 369; 33 N. Y. 658; 2 Sandf. 444; 5 id. 447; 51 N. Y. 447; 11 Pai. 436; 45 N. Y. 98; *Syracuse City Bk. v. Tallman*, 31 Barb. 201, 208.) The right to the rents "does not result from the relation of the parties, but from equitable considerations alone. It is not a matter of strict right, and each application is addressed to the sound discretion of the court." (Thomas on Mortgages, 302; *Syracuse City Bk. v. Tallman*, 31 Barb. 201, 208; Bump's Law and Practice of Bankruptcy, 189, 191; U. S. Statutes, §§ 711, 4972.) John H. Bagley, Jr., as assignee in bankruptcy of David Vrooman, is not a party to the action. When sued concerning his office, or the property which he holds as such officer, he should be so designated in the summons. (Code, § 128; Voorhies' Code of 1870, note *e* to § 128; 1 Arch. Pl. 81; 8 How. Pr. 83, 84; 1 Wait's Pr. 470; *Merritt v. Seaman*, 6 N. Y. 168, 172; *Sheldon v. Hoy*, 11 How. 11; *Worden v. Worthington*, 2 Barb. 368; *Root v. Price*, 22 How. 372; *Ogdensburg Bk. v. Van Rennselaer*, 6 Hill, 240.)

EARL, J. The plaintiff did not have a strict legal right to the appointment of a receiver. Whether a receiver should be appointed rested in the discretion of the Supreme Court. (*Syracuse Bank v. Tallman*, 31 Barb. 201.) Assuming that that court had the power to compel Bagley to pay the rents to the receiver after he was appointed, it was not obliged to exercise the power. Whether it should exercise the power was just as much in its discretion as the appointment of the receiver. But until the receiver was appointed, Bagley, as the owner of the equity of redemption, standing in the place of the mortgagor, had the right to receive the rents and could not be compelled to account for them. By the appointment of the receiver the plaintiff obtained an equitable lien upon the unpaid rents, and upon them only. (*Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Howell v. Ripley*, 10 Pai. 43; *Astor v. Turner*, 11 id. 436; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 id. 242.)

It matters not that here the rents were received by Bagley during the pendency of the motion for the receiver. It is

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enough that they were received before the receiver was actually appointed and before plaintiff's equitable lien upon them had attached. If Bagley was guilty of any fraud or contempt upon the Supreme Court in taking the rents while he knew the application for a receiver was pending, it was for that court to deal with such fraud or contempt, and its action in respect thereto is not subject to our review.

The order appealed from should, therefore, be affirmed with costs.

All concur, except RAPALLO, J., absent.

Order affirmed.

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GEORGE BASSETT, as Supervisor, etc., Appellant, v. ELLEN WHEELER, Respondent.

It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1867 (chap. 361, Laws of 1867) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted.

Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the question was not reviewable here. (Code of Civil Procedure, § 1337.)

(Submitted March 1, 1881; decided March 8, 1881.)

APPEAL from an order of the General Term of the Supreme Court, in the fourth judicial department, made October 23, 1878, which reversed an order of the County Court of Onondaga county, denying a motion on the part of defendant to set aside an order in supplementary proceedings for the collection of a tax granted *ex parte* under the act chapter 361, Laws of 1867, by the county judge, requiring the defendant "to appear and answer concerning her property."

The facts appear sufficiently in the opinion.

W. P. Goodelle for appellant. The order granted for the examination of the respondent concerning her property was

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proper and legal, the affidavits upon which it was made were sufficient and contained an adequate statement of facts to authorize the granting of it. (Chap. 361, Laws of 1867; 54 N. Y. 67.) The residence of the respondent must be deemed to have continued in Salina, until a change is affirmatively shown, and the burden is on respondent to show a change or abandonment of her former residence. (*Matter of Nichols*, 54 N. Y. 62; *Isham v. Gibbons*, 1 Bradf. 69; 1 Am. Lead. Cases, 747; *Burroughs on Taxation*, 215.) The affirmative proposition must be satisfactorily shown. There must be a removal without any intention of returning. (*Matter of Nichols*, 54 N. Y. 62; *Bulkley v. Williamson*, 3 Gray, 493.) The finding that respondent had not in fact abandoned her residence in Salina is the only reasonable conclusion from the evidence. (51 N. Y. 12; *Crawford v. Wilson*, 4 Barb. 506; *Cochrane v. Allen*, 4 Allen, 177; *Cadwallader v. Howell et al.*, 3 Harrison, 138; *Matter of Fitzgerald*, 2 Caines, 319; *Matter of Wrigley*, 8 Wend. 140.)

*Irving G. Vann* for respondent. Every person shall be assessed in the town or ward where he resides when the assessment is made for all personal estate owned by him. (R. S., § 2, art. 1, tit. 2, chap. 13, part 1, as amended by the Laws of 1851, chap. 176, p. 332.) The phrase, "when the assessment is made," refers to the first day of July. (*Myyatt v. Washburn*, 15 N. Y. 316; *Clark v. Norton*, 3 Lans. 484.) In case any person possessed of personal estate shall reside during any year in which taxes are levied in two or more counties or towns, his residence, for the purposes of taxation, shall be deemed and held to be in the county and town in which his principal business shall have been transacted. (1 R. S. 389.) On the date of the assessment in question, the defendant resided in the city of New York. (*Burrill's Law Dict.*; *Phillips on Domicile*, 13; *Elbers v. U. S. Ins. Co.*, 16 Johns. 128; *Crawford v. Wilson*, 4 Barb. 504; *Bailey v. Buell*, 59 id. 158; *Hulbert v. Green*, 41 Vt. 490; *Gregory v. Bugbee*, 42 id. 480; *Alexandria v. Hunter*, 2 Mun. 228; 2 Kent's

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Com. 431, note *e*; *Bruce v. Hamilton*, 2 Bos. & Pul. 229, note; *Trost v. Brisbin*, 19 Wend. 11; *Hegeman v. Fox*, 31 Barb. 475; *Wade v. Matheson*, 4 Lans. 158; *Matter of Crawford*, 3 N. Y. Leg. Obs. 76.) This makes her taxable upon personal property only in the city of New York. (1 R. S. 389.)

DANFORTH, J. It was shown by affidavit that a tax of \$83.95 was levied in 1876 by the board of supervisors of Onondaga county, upon Ellen Wheeler, and returned to the county treasurer uncollected for want of goods and chattels. In the affidavit she was described as a resident of the town of Salina, and it may be assumed that enough was stated to give the county judge jurisdiction over the matter, and authority to issue an order requiring Miss Wheeler "to appear and answer concerning her property," as provided by chapter 361 of the Laws of 1867. The proceeding was, however, *ex parte*, and it was competent for her to procure the dissolution of the order if improvidently granted. Her application was to that end and upon notice; whether it should be granted or not depended upon the question whether, at the time the tax was imposed, she was, in fact, "a resident of the county." It has been answered variously. By the county judge affirmed, and the General Term denied. We cannot say there is no evidence in its support, but it certainly is not all that way. She was a single woman and of age; at one time she occupied, with her own furniture, a room in the house of her mother, to whom she paid board money. But before the imposition of the tax she sold her furniture, gave up her room, and depending upon her own exertions for a livelihood, procured employment in New York, and then, for the double purpose of profiting by it and at the same time pursuing her musical education, went thither. She left Salina with no thought of returning, but with the intention of remaining in New York city. This was in December, 1875, and she has, in fact, since that time resided there. That she could change her residence and acquire a new one is not denied, and as it is apparent that after December, 1875,

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she had no dwelling or abode in Onondaga county, I am unable to see how she could do more than she has done to indicate her intention to become a resident of New York or carry that intention more completely into effect. There was an intent to change her residence, an actual removal, a new abode taken and business entered upon. It is, however, not necessary to pursue the inquiry, for the appellant has at most shown that the evidence is conflicting, and the question of fact depending thereon is not subject to review in this court. (§ 1337, Code of Civ. Proc.)

The appeal should, therefore, be dismissed, with costs.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

FIRST NATIONAL BANK OF MEADVILLE, Appellant, v. THE  
FOURTH NATIONAL BANK OF NEW YORK, Respondent.

Where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal.

*U. T. Co. v. Whiton* (78 N. Y. 491), distinguished.

*First Nat. Bank v. Fourth Nat. Bank* (22 Hun, 563), reversed.

(Argued March 1, 1881; decided March 8, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term which directed the readjustment of costs in this action as taxed by the clerk, by striking therefrom allowances of costs on appeal to this court. (Reported below, 22 Hun, 563.)

Plaintiff obtained judgment, which was affirmed on appeal to the General Term, but it and the judgment of the General Term was reversed on appeal to this court "with costs to abide the event." (77 N. Y. 320.)

A new trial was had and plaintiff was again successful; the clerk allowed and taxed the costs of the appeal to this court.

*George A. Black* for appellant. Plaintiff was entitled to the costs as taxed by the clerk. (Old Code, § 306; *Union Trust Co. v. Whiton*, 17 Hun, 593; 78 N. Y. 491; *Howell v. Van Siclen*, 4 Abb. N. C. 1, 2.)

*David J. H. Wilcox* for respondent. Plaintiff had no statutory right to the costs claimed. They were entirely in the discretion of this court. (Code of Procedure, § 306.) This court so exercised its discretion in the judgment of reversal, that plaintiff cannot recover costs of the appeal to it. (Code of Procedure, § 303; *Howell v. Van Siclen*, 8 Hun, 524; affirmed, 70 N. Y. 595; *Cochran v. Gotthwald*, 8 J. & S. 442; *Union Trust Co. v. Whiton*, 17 Hun, 593; *Southwick v. First Nat. Bank of Memphis*, 9 N. Y. Weekly Digest, 520; *Isaacs v. N. Y. Plaster Works*, 4 Abb. N. C. 4.)

ANDREWS, J. The plaintiff is entitled to tax the costs of the appeal to this court. The first judgment was reversed, with costs to abide the event. The event of the new trial was the circumstance which was to determine which party should recover the costs of the appeal. The order did not limit the recovery of costs to the prevailing party on the appeal, in case he should finally succeed in the action. Appeals are often taken for technical errors which do not affect the merits, and although the appellant is successful, the effect of such appeals in many cases is simply to protract and increase the expense of the litigation. There is generally no injustice in awarding costs on the appeal to the party who shall finally recover. It is conceded that the plaintiff is entitled to tax the costs of both trials. This is the undoubted practice, although the first judgment in his favor was erroneous. In analogy he should be allowed to tax the costs of the appeal. We have often limited the recovery of costs on appeal to one of the parties, but where the order reversing a judgment and granting a new trial is made with costs to abide the event, without other limitation, we understand that the party finally succeeding in the action is entitled to tax them. This construction was put upon a similar order in *Koon v. Thurman* (2 Hill, 357.) In *Union Trust Co. v.*

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*Whiton* (78 N. Y. 491), we refused to interfere with the construction given by the General Term of the first department to its own order. The question here is as to the construction of our order. The order of the Special and General Terms should be reversed and the taxation by the clerk should be affirmed.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

VIRGINIA N. TAYLOR, as Executrix, etc., Appellant, v. THOMAS  
L. WING, Impleaded, etc., Respondent.

In an action to foreclose two mortgages, it appeared that there was a prior mortgage upon the premises, the beneficiary owner whereof, in pursuance of an agreement under which a fourth mortgage was executed and accepted, covenanted that said mortgage should have priority of lien over his mortgage, as if it had been previously executed and recorded. The lien of the first mortgage was subsequently discharged. *Held*, that the covenant did not give the fourth mortgage a priority of lien over plaintiff's mortgages; that the intent of the parties to the agreement under which the fourth mortgage was taken was not to place that mortgage ahead of plaintiff's mortgages, or to give its owner an interest in the first mortgage, but simply that the liens prior to the fourth mortgage should only be the amount of plaintiff's mortgages; and that the agreement was fully satisfied by a discharge of the first mortgage.

It was stipulated in plaintiff's mortgages which were executed prior to the passage of the act (chap. 538, Laws of 1879) reducing the rate of interest to six per cent, that the principal sum should bear interest at seven per cent until paid. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due, from the date of the decision, at the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate.

*Taylor v. Wing* (23 Hun, 233), reversed.

(Argued February 2, 1881; decided March 15, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, entered upon an order

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made December 14, 1880, reversing in part a judgment entered upon a decision of the court on trial at Special Term. (Reported below, 23 Hun, 233.)

The nature of the action and the facts appear sufficiently in the opinion.

*O. D. M. Baker* for appellant. The respondent must stand here by the theory of his case, as presented by his answer and at the trial. (*Home Ins. Co. v. Transportation Co.*, 51 N. Y. 93; 96.) On the date of William L. Ferris, Jr.'s, assignment to Wing, the mortgage was not owned by Ferris; it was not a lien, and had no legal life; Ferris could not enforce it, nor can respondent as his assignee—he stands where Ferris did. (*Schaffer v. Reilly*, 50 N. Y. 61; *Union College v. Wheeler*, 61 id. 88; *Davis v. Bechstein*, 69 id. 440.) Priority is a matter of such strict legal right, that the courts have not permitted equitable considerations to disturb it. (*Banta v. Garmo*, 1 Sandf. Ch. 383; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553.) That plaintiff was not a party to the release does not affect her right to priority. (*Smith v. Brackett*, 36 Barb. 571.) The exception to the finding, as to the rate of interest, is too general. (*McMahon v. N. Y. & Erie R. R. Co.*, 20 N. Y. 463, 470.) The finding excepted to is good in the part as to principal and as to some interest, and, being so, the exception fails. (*Haggart v. Morgan*, 5 N. Y. 421; *Jones v. Osgood*, 6 id. 233; *Coldwell v. Murphy*, 11 id. 416; *Newell v. Doty*, 33 id. 83-93; *Storm v. Transportation Co.*, 38 id. 240-2.) The decree is in the nature of a direction for specific performance of, and follows and executes, the agreement of the parties. (*Chrysler v. Renois*, 43 N. Y. 209.)

*W. Farrington* for respondent. In a case tried by the court, a finding of fact without evidence to support it, if excepted to, presents a question of law, subject to review in this court. (*Sickles v. Flannagan*, 79 N. Y. 224; *Draper v. Stouvenal*, 38 id. 219; *Mason v. Lord*, 49 id. 476; *Matthews v. Coe*, id. 57.) The refusal to find a fact proved by uncon-



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troverted evidence is a legal error available in this court. (*Mason v. Lord*, 40 N. Y. 476, 484.) The proceedings on the accounting, and the decree in those proceedings, are not evidence in this action of what was adjudged therein. (*Dale v. Roosevelt*, 1 Paige's Ch. 35; *Booth v. Powers*, 56 N. Y. 22.) The conveyance, and the declaration subjecting the land to the mortgage, not having been made for the benefit of the mortgagor and he not being privy to them, the grantee and mortgagor had power to revoke the dedication of the land to the payment of the mortgage. (*Knickerbocker Life Ins. Co. v. Nelson*, 78 N. Y. 137, 152, 153; *Simpson v. Brown*, 68 id. 355; *Merrill v. Green*, 55 id. 270; *Kelley v. Roberts*, 40 id. 432.) There was no merger by the conveyance to the trustee, of the lands covered by the mortgage. (*Clift v. White*, 12 N. Y. 532; *Preston on Quantity of Estates, etc.*, 567; *James v. Morey*, 2 Cow. 248, 285, 303, 313; *Clift v. White*, 12 N. Y. 532, 533; *Payne v. Wilson*, 74 id. 348; *Millsparugh v. McBride*, 7 Paige's Ch. 509, 511.) There was no estoppel. (*Brown v. Bowen*, 30 N. Y. 519, 541; *Pike v. Acker*, Hill & Denio's Sup. 90; *Springsteen v. Powers*, 3 Robt. 483; *White v. Ashton*, 51 N. Y. 280; *Baker v. Mut. L. Ins. Co.*, 43 id. 283; *Brewster v. Striker*, 2 id. 19.) As Wing derived his title to the county treasurer mortgage from the bank through Millard, he is entitled to be first paid \$2,100 out of the proceeds of the sale. (*Frost v. Yonkers Sav. Bk.*, 70 N. Y. 553.) The judgment erroneously directs payment of interest on the amount adjudged due at seven per cent. A judgment can only draw interest at the legal rate. (*Watson v. Fuller*, 6 Johns. 284; *Sayre v. Austin*, 3 Wend. 496; chap. 324, Laws of 1844; Code of Civ. Proc., § 1211.)

EARL, J. This is an action to foreclose two mortgages made by Lindley W. Ferris, since deceased, one for \$2,000, given to Garret B. Conklin, May 1, 1867, and by him assigned to plaintiff's testator February 8, 1869, and the other for \$6,000, given at the latter date directly to the testator. It is undisputed that the principal sum of \$8,000, and the interest thereon

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from the same date, less \$120, is due upon these mortgages to the plaintiff. The controversy between these parties grows out of two mortgages held by the defendant Wing, one of which is earlier and the other of which is later than plaintiff's mortgages.

The judge at Special Term found among other things that in November, 1864, Lindley M. Ferris and his wife executed and delivered to the treasurer of Orange county a mortgage upon the premises mentioned in the complaint, to secure the payment after his death of \$9,000 in equal portions, to his three minor children, Gertrude C., Caroline M. and William L. Ferris, Jr., which mortgage was at the same date recorded in the clerk's office of Dutchess county; that after Gertrude reached her majority, in March, 1867, she executed to her father a release and discharge of her interest in that mortgage, and after Caroline reached her majority, November 18, 1870, she also executed to her father a similar release and discharge, and that there then remained secured by the mortgage only the sum of \$3,000, the portion therein of William L. Ferris, Jr.; that on the 18th day of November, 1870, Lindley M. Ferris and wife executed and delivered to The Farmers & Manufacturers' National Bank of Poughkeepsie, a mortgage upon the same premises, with other lands, conditioned to pay the sum of \$15,000 on demand, with interest, but, in fact, to secure the bank for discounts to be made for Ferris; that at the same time William L. Ferris, Jr., then a minor, together with Lindley M. Ferris and D. Colden Murray, by an instrument under seal, covenanted and agreed that on the arrival of William L. Ferris, Jr., at his majority, he would execute and deliver to the bank an instrument sufficient to release his interest in the mortgaged premises, and to give the bank a lien by virtue of its mortgage prior to the lien of the mortgage to the county treasurer; that William L. became of age on the 13th day of January, 1872, and on the 8th day of February thereafter he executed an instrument under seal referring to the prior instrument as annexed, in which he covenanted and agreed that the bank mortgage should have

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priority of lien before and above the mortgage to the county treasurer, as fully and to the same effect as if it had been previously executed and recorded; that after he became of age he received a bond from his father for \$5,000, which included his share of the sum secured by the mortgage to the county treasurer; that such bond was given and received with the intent to discharge the land described in that mortgage from the lien of the mortgage, and to make the debt secured thereby a personal debt against the obligor, his father; that the bank mortgage, with the agreement of William L. Ferris, Jr., as to the priority of that mortgage, was in March, 1878, assigned to one Millard, and on the 6th day of January, 1880, they were duly assigned to the defendant Wing, there being then due upon the mortgage the sum of \$2,100; that on the 3d day of January, 1880, in pursuance of an order made by the Supreme Court upon the application of William L. Ferris, Jr., the county treasurer of Orange county assigned the mortgage for \$9,000 held by him to William L., and on the 6th day of January thereafter he assigned the same mortgage to defendant Wing, as security for the sum of \$600 then loaned to him by Wing, and also as additional security for the sum of \$2,100 secured by the bank mortgage. And upon the facts found, the court decided, as matter of law, that the plaintiff was entitled to judgment, deciding that the mortgage first executed to the county treasurer was not a lien upon the premises described in the complaint, and directing the clerk of Dutchess county to cancel and satisfy the same of record, and declaring plaintiff's two mortgages to be liens upon the premises prior to the lien of the bank mortgage and to be first paid out of the proceeds of the mortgaged premises.

Upon appeal to the General Term, the court there, without disturbing any of the findings of fact at the Special Term, decided that, by virtue of the agreement of William L. Ferris, Jr., the bank mortgage was substituted in the place of the mortgage to the county treasurer, and took the place thereof, and hence that it had priority over plaintiff's mortgages. The plaintiff claims that the learned General Term fell into error

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in this decision, and we are of the same opinion. When the bank took its mortgage, we must assume that it had notice of plaintiff's two mortgages which were then upon record. It was apparently willing to take its mortgage subject to these mortgages, but unwilling to take it subject also to the \$3,000 secured to the mortgagor's son in the first mortgage, and hence the agreement that that mortgage should be postponed to its mortgage. It was not the intention of the parties to that agreement to place the bank mortgage ahead of plaintiff's two mortgages, or to give the bank any interest in the first mortgage. The bank found three mortgages upon the premises, securing \$11,000, and what the parties intended to effect by the agreement was that there should be ahead of the bank mortgage \$8,000 only, instead of \$11,000, and that agreement was fully satisfied by the discharge of the first mortgage.

If some holder of the first mortgage were here claiming priority over the bank mortgage, we would have a different question to solve. Some means would then be taken to protect the bank mortgage against such claim; and that could be done, in case the proceeds of the foreclosure sale were not sufficient to satisfy all the mortgages, by taking so much of such proceeds, otherwise applicable upon the first mortgage, as would be sufficient to satisfy the bank mortgage, and applying them upon that mortgage. But William L. Ferris, Jr., did not assign his interest in the first mortgage to the bank as security for its mortgage, and did not bind himself, or preclude himself, from receiving payment of his interest in the first mortgage, and he did not agree that the bank mortgage should stand in the place of the first mortgage. When he discharged the lien of the first mortgage he placed the bank, as to its mortgage, just where it must have been intended, by his agreement, it should be placed. We can, therefore, perceive no ground upon which the defendant Wing can have priority over plaintiff's mortgages.

But the defendant Wing makes a further claim that the court at Special Term erred in finding that the lien of the first mortgage had been discharged in the life-time of the mortgagor,

and in ordering it to be canceled and discharged of record. The General Term not having reversed this finding of fact, we need to look only to see if there was any evidence which authorized it. We think there was. The evidence shows that, after the death of Lindley M. Ferris, all his children and his executors treated that mortgage as discharged, and the \$3,000, which was secured thereby to William L. Ferris, Jr., as an unsecured claim against the estate of Lindley M. Without now going into the evidence in detail, we think there was some evidence upon which the court at Special Term could base its finding, and we are, therefore, concluded thereby.

Plaintiff's mortgages contained the usual insurance clause, and she claimed \$45 paid for insurance upon the premises, and this was allowed to her. We do not think there was evidence sufficient to authorize such allowance.

In each of plaintiff's mortgages it was expressly stipulated that the principal sum should bear interest at seven per cent until it was paid. It is admitted that there was no error, notwithstanding the statute subsequently passed, reducing the rate of interest to six per cent, in allowing the plaintiff's interest at seven per cent, as stipulated, until the date of the decision of the case. At that date there was due, for principal and interest thus computed, upon the mortgages, the sum of \$8,687.33. This sum the court ordered to be paid to the plaintiff, with interest at seven per cent until paid, out of the proceeds of the sale, and so it was provided in the judgment. After the entry of judgment of foreclosure the plaintiff was entitled to interest upon the sum found to be due upon the mortgages, not by virtue of the mortgages, but by virtue of the judgment in which the mortgages became merged. The interest to be allowed upon the judgment is the lawful interest, to wit: six per cent. The General Term should have corrected these two errors, and we will now do what it should have done. We have examined all the other allegations of error, and find none which call for a reversal of the judgment at Special Term.

The order of the General Term should, therefore, be reversed, and the judgment of the Special Term should be modi-

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fied by striking therefrom the allowance of the \$45, and the interest thereon, and also by providing that the interest upon the amount found due the plaintiff upon the mortgages should be at the rate of six per cent, instead of seven per cent, and, as thus modified, that judgment must be affirmed, without costs to either party upon the appeals to the General Term and to this court.

All concur, except FOLGER, Ch. J., and MILLER, J., not voting.

Order reversed and judgment affirmed as modified.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff in Error,  
v. ANDREW DOWLING, Defendant in Error.

Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those counts, and a judgment on the verdict is as to them a bar to further prosecution.

Upon a reversal of the conviction the trial and conviction are not a bar to a new trial upon the count on which the verdict of guilty was rendered; but the reversal does not disturb the verdict of acquittal upon the other counts.

An indictment contained two counts, one charging burglary and larceny, the other the receiving of stolen goods with knowledge; there was no separate count for burglary or larceny. The prisoner's counsel, on trial, moved to strike out the count "for burglary" because of failure of proof; this was granted; he then moved to quash the count "for larceny," which was denied, the question of larceny was submitted to the jury without objection and the prisoner was convicted thereof. The conviction was reversed on writ of error and a *venire de novo* ordered. *Held*, that the effect of the decision upon the motion to strike out the count for burglary was simply to hold that the prisoner could not be convicted, on the evidence, of burglary, and to strike out so much of the count as charged that offense; that the new trial must be had upon the same indictment; but that upon the new trial the prisoner could only be tried for larceny.

The trial was had after the passage of the act of 1876 (chap. 182, Laws of 1876) declaring that persons jointly indicted shall be competent witnesses for each other. One L. who was jointly indicted with the prisoner was called as a witness on his behalf. His testimony was objected to and refused. *Held*, error.

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Some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the men of whom the alleged purchase was made. This was objected to and excluded. *Held*, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge.

*Wills v. People* (3 Park. Cr. 473), *People v. Rands* (id. 335), overruled.

The prosecution proved the finding at the house of the prisoner other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. *Held*, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly.

The act of 1877 (chap. 167, Laws of 1877) in relation to criminal offenses committed on railroads, providing that for any crime or offense committed within this State \* \* \* "in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offense of receiving with guilty knowledge goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed.

(Argued February 28, 1881; decided March 15, 1881.)

ERROR to the General Term of the Supreme Court, in the third judicial department, to review order made November 27, 1878, reversing a judgment and conviction of the defendant in error by the Court of General Sessions in and for the county of Schenectady, of the crime of grand larceny, and remitting the case for a new trial.

The defendant in error was jointly indicted with one Michael Dowling. The indictment contained two counts, one charging the accused with receiving certain goods stolen from the cars of the New York Central and Hudson River railroad, while being transported as freight on said road, with knowledge that they had been stolen. The second count charged the accused with burglariously entering a freight car on said road and steal-

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ing therefrom certain goods which were being transported as freight.

At the close of the evidence on the part of the prosecution the counsel for the prisoner moved "that the count in the indictment for burglary be stricken out" on the ground substantially of failure of proof; this motion was granted. Said counsel then moved "to quash the count in the indictment for larceny, upon the ground that there is no proof that the property was taken from the owner without his consent;" this motion was denied, and said counsel duly excepted. Said counsel then moved to quash the count for receiving stolen goods, on the ground that the court had no jurisdiction to try it. This motion was denied and exception taken.

The further material facts appear sufficiently in the opinion.

*W. P. Goodelle* for plaintiff in error. The second count in the indictment is a compound count, and under it defendant could be convicted of either burglary or larceny, if the evidence warranted. (25 Gratt. 908; 3 Harring. 55; 7 Kans. 106; 14 Vt. 353; 14 Ind. 572; 2 Park. 123; 20 Pick. 356; 31 Me. 592; *Commonwealth v. Luck*, 20 Pick. 356.) If the action of the Court of Sessions simply had the effect of taking the question of burglary from the jury on the trial, then the indictment will stand before that court in the same condition as before the previous trial. (*Morris v. State*, 1 Blatchf. 37; *State v. Comrs.*, Riley's Law Cases, 273.)

*J. H. Clute* for defendant in error. No person can be convicted as a principal on an indictment charging him with being an accessory after the fact. (2 Arch. P. & Pl. 370, note; *State v. Hogan*, R. M. Charl. 474; *Commonwealth v. Barry*, 116 Mass.) The court erred in excluding the declarations of the prisoner, offered in evidence. (*Durant v. People*, 13 Mich. 351.) The prisoner was a competent witness, and he could swear to the transaction as well as any other witness, on the question of receiving stolen goods knowing them to have been stolen. (*Wills & Conley v. People*, 5 Park. Cr. 499.)



FOLGER, Ch. J. We think that the ground for the reversal of the judgment, stated in the opinion at General Term, is too close. It rests finally upon the motion of the prisoner's counsel to strike out the count in the indictment for burglary and the granting of the motion by the court, and the striking from the indictment a count for burglary. What this motion meant and what it was understood to mean by the court, and what the granting of it was understood by court and counsel to mean, and what the striking out of a count meant, is shown by the next sentence in the error-book. There the prisoner's counsel moves to quash the count in the indictment for larceny, which motion the court denied, thinking that there was proof enough to go to the jury on the taking from the cars. Now, there was not in the indictment a single and simple count for burglary, nor was there a single and simple count for larceny. That count in the indictment that charged a burglary, the same count charged a larceny, and *vice versa*. If the motion made to strike out the count for burglary meant to ask for a striking out of the whole count that charged burglary and larceny, why, when the motion was granted, did counsel at once move to quash the count for larceny? And why did the court hear to the motion but deny it? If the striking out of the count for burglary took out the whole of the count in which burglary was charged, there was left no count for larceny to be the subject of a motion to quash. The motion to quash the count for larceny recognized that there was a count there to quash. But it was not there, unless it was in the count for burglary and larceny. Now, if the striking out a count for burglary struck out the count for burglary and larceny, the retaining the count for larceny and making it the subject of a motion to quash retained the count for burglary and larceny. Besides, to ask to strike from the indictment the count for burglary was to ask to strike out what was not there, for there was no single and simple count for burglary in the indictment; and to grant the motion was to grant what could not be done, and to strike it out was to strike out nothing. To be as technical as is the position of the defendant in error, there was no count for bur-

glary in the indictment; and to make and grant a motion to strike out a count for burglary was to do a vain thing. A count for burglary is one that charges a breaking and entering with a specified felonious intent, and stops there. When a count goes farther, and after charging a breaking and entering with a felonious intent also charges the doing of that which was the intent in the breaking in, it becomes a count different from one for burglary simply; as, if the intent charged is to steal, take and carry away certain goods there being, and the *asportavit* is also charged, it becomes a count for burglary and larceny. When, then, the court said, Strike out the count in the indictment for burglary, it cannot be held, in strictness, to have said, Strike out the count for burglary and larceny, for that the latter is a thing which the language of the court did not take hold of. We are at liberty, then, as there was not that in the indictment upon which the court could do that which its language, strictly taken, would show it did, to seek just what the court meant to do, and just what it did, by language that can have no literal application to the indictment. From the fact of the next step in the case being the motion to quash the count in the indictment for larceny, entertained but denied by the court, and from the fact that the court charged the jury at some length on the matter of the larceny alleged, and that the counsel for the prisoner took no exception to the charge in this particular, it is plain that the court and the counsel deemed that the plaintiff in error was on trial for larceny, from the commencement until the jury gave their verdict. And we think that what was meant, and what was done at the trial, was no more than to hold that the prisoner could not, on the evidence, be convicted of burglary, and that the only charges for the consideration of the jury were that of receiving stolen goods, knowing them to be stolen, and that of larceny of the goods.

Therefore, while we have, for other reasons, concluded to affirm, in effect, the judgment of the General Term reversing the conviction, and ordering a *venire de novo*, we hold that the indictment has not been affected, and that the new trial, if any

there is, must be had upon the same indictment as it was presented by the grand jury, with a limitation soon to be expressed herein.

But there is another question, arising under the inexact verdict of the jury. By it, the prisoner was found guilty of larceny. It made no mention of the count for receiving stolen goods, nor of the charge of burglary contained in the count for burglary and larceny. Being silent as to those, while it found specifically upon the charge of larceny, it was equivalent to a verdict of acquittal on the count for receiving, and of the charge of burglary (*Guenther v. The People*, 24 N. Y. 100); and where on a trial on an indictment of different counts, there is a specific verdict of guilty on one count, and the verdict is silent as to the other counts, and there is a conviction on the verdict of guilty, it is a bar to further prosecution on the counts on which the verdict is silent. (Id.) So much is settled in this State. Yet there is a further question. The prisoner has brought his writ of error, the General Term have reversed the conviction, and in effect have set aside the verdict of guilty, and this court so far affirms the judgment of the General Term. Clearly that trial and conviction are not now a bar to a subsequent trial for larceny. "No case is cited where, the verdict of guilty having been set aside on the motion of the defendant, it has been held a bar to a new trial." (*United States v. Keen*, 1 McLean, 435.)

But the reversal of the conviction does not disturb the verdict of acquittal. It is like a case of several defendants, some of whom are acquitted and some found guilty on the trial. The court may grant a new trial as to those convicted, without being forced to set aside the entire verdict. (Tidd's Pr. 820; *Rex v. Marobey*, 6 T. R. 619.)

The matter at the bottom is the constitutional provision that "No person shall be subject to be twice put in jeopardy for the same offense" (Const. of N. Y., art. 1, § 6), and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground, that by asking for a correction of errors made on the first trial, he does waive his

constitutional protection, and does himself ask for a new trial, though it bring him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one, and keeps it as to the other. It is upon this principle, that where, by a verdict of guilty on one count or for one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought. We do not find any decisions in this court on this question, other than as we have above cited. They exist in profusion in other States, and *Campbell v. The State* (9 Yerg. 333) and *State v. Kittle* (2 Tyler, 471) seem in point. Our opinion is, that on the new trial that is ordered, the prisoner cannot be tried, save for the offense of larceny.

We are of the opinion that there was error in refusing the testimony of Myron Dowling, though he stood jointly indicted with the defendant in error. The act of 1876 (Laws of that year, p. 163, chap. 182, § 1) declares that all persons jointly indicted shall, upon the trial of either, be competent witnesses for each other, the same as if not included in the same indictment. The trial took place in 1878, and as the statute changed a rule of evidence, and gave competency as a witness to a person who might not have been competent before, it was applicable to this case and should have been observed. No statute or rule preventing the application of it has been brought to our notice. It is probable that the statute was not brought to

the attention of the Sessions, and being comparatively new, was not noticed.

The defendant in error offered to prove what was said, as to the mode of obtaining the property, by the men of whom he alleged that he bought it, at the time of the alleged purchase. It was doubtless hearsay, and was not competent testimony to prove that the alleged vendors came by the property in the mode asserted. But as it was competent for the defendant to prove the acts by which the goods came into his possession, if he was able to, it was competent to prove all pertinent sayings and doings that then were made and done, as relevant upon the issue of guilty knowledge. It was competent. It was for the jury still to say whether it was of weight in showing the prisoner innocent in the transaction, if they found that the transaction took place as he testified. (*Ree v. Whitehead*, 1 Carr. & Payne, 67; *Powell v. Harper*, 5 id. 590; *Hayslep v. Gymer*, 1 Ad & Ell. 162.) The cases to the contrary, cited from 3 Park. Cr. (*Wills v. People*, 473, and *The People v. Rando*, 335), were doubtfully decided. On principle, such evidence must be competent. It is the rule, generally speaking, that declarations accompanying acts are admissible in evidence as showing the nature, character and object of such acts. (1 Stark. Ev. 51, 87.) The direct proof of knowledge of the larceny, is not needed to convict of receiving stolen goods with guilty knowledge. That knowledge may be gathered from the circumstances of the case, of which one is the buying the goods at an under valuation. (1 Hal. 619; 2 East's P. C., chap. 16, § 153, p. 765.) If the circumstances of the case and such buying are proof tending to show guilty knowledge, then whatever that is relevant, that was said at the time of the buying, is a part of the *res gestæ*, and competent to explain the act. And see *Reg. v. Wood* (1 F. & F. 497; 1 Phil. Ev. 234 [7th ed.]). Of course, the jury are not bound to believe either that the statements, if made, were true, or that the prisoner believed them to be true and was moved by them, or that they were in fact made to him. Like all other testimony, it is to

be given to them for what it is worth, and it is for them to give to it the value it deserves.

On the trial, the people proved the finding, at the house of the prisoner, other goods than those named in the indictment; and there was testimony tending to prove that those other goods had also been stolen, and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of those goods in Schenectady, and that he asked the persons of whom he bought them to go look at them and identify them. The offer was rejected and exception taken. If the proof on the part of the people was competent and relevant, the offer of the prisoner should not have been rejected. But a party has not the right to give immaterial evidence because his adversary has done so before him. It is needed then to seek whether the people had the right to prove the finding of other goods. As a general rule, on the trial for one offense, proof is not admissible that the accused has committed another, though it be of the same kind. There are exceptions, when guilty knowledge is a part of the crime; as where all the property made the subject of the proof has been stolen from the same person, and delivered to the receiver by the same thief, though at different times, and there is such a connection of circumstances as furnishes a natural inference that, if he knew that one piece of it was stolen, he must have known that every piece was. (*Coleman v. The People*, 55 N. Y. 81, 91, and cases cited; *Reg. v. Nicholls*, 1 F. & F. 51.) If the proof as to other property came up to this requirement, it was competent, and then the prisoner had a right to repel it, by testimony tending to show that he came by the property honestly. We do not analyze the testimony given by the people, to see whether it came up to that requirement, as what we had said gives the rule for the new trial which we shall order.

Another point was made on the trial which it is well enough to consider, as it may come up incidentally on the new trial. One count in the indictment was for receiving stolen goods knowing them to be stolen. The indictment was found and

the trial had in Schenectady county. The testimony showed the finding of the goods in the possession of the prisoner in Albany county. It is claimed that, if he was guilty of the offense, it was one local in its character, and triable only in Albany county. To this the statute is set up. (Laws of 1877, p. 179, chap. 167, § 1.) That provides that, when any crime or offense shall have been committed in respect to any portion of the freight of any railroad train making a trip on a railroad in this State, an indictment for the same may be found in any county through which such train shall have passed in the course of the same trip, and may be tried in such county as well as in the county in which the offense was committed. This law was enacted before the finding of the indictment, and before the commission of the offense by the prisoner, if he did offend.

All the facts to bring the case within the statute are plainly shown, and the meaning of the statute is clear enough, except that which is involved in the phrases, "any crime or offense," "in respect to any portion of the lading or freight." Nor is it hard to get the meaning of that. "Any crime or offense" means any already known to the law. The receiving of stolen goods with guilty knowledge is such. An offense is committed in respect to freight, when it, wrongfully and injuriously to the owner or lawful custodian, affects that freight.

The wrongfully taking it and carrying it away from such owner or custodian does so affect it, and the receiving it with guilty knowledge of such a wrongful taking does also so affect it. The language of the statute is not technical nor precise. The word "respect" in it is not used with a clear notion of its primary or its acquired meaning. Yet it is plain that the legislature meant any offense, which in the doing of it, acted upon the freight as the subject of the commission of the offense. To receive the freight after it had been stolen, with guilty knowledge, was such an offense. The legislature did not declare or define an offense not before known to the law. It permitted a place of trial of known offenses elsewhere than was lawful before the passage of the act.

It was in the power of the legislature so to do. We are of

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the opinion that the indictment was legally found in Schenectady county and the prisoner was legally tried upon it there.

The order of the General Term should be affirmed and a *venire de novo* be ordered, on the count in the indictment charging larceny. ●

All concur, except MILLER, J., who held that the count for burglary and larceny was stricken out, and that the General Term was right.

Ordered accordingly.

LEOPOLD KNUPFLE, as Administrator, etc., Respondent, v. THE KNICKERBOCKER ICE COMPANY, Appellant.

In an action to recover damages for alleged negligence proof of the violation of a city ordinance does not establish negligence *per se*; it is competent evidence upon the question to be submitted to the jury, but not conclusive. 932, 17

*Jetter v. N. Y. & H. R. R. Co.* (2 Abb. Ct. of App. Dec. 458), limited and distinguished.

*Knupfle v. K. Ice. Co.* (28 Hun, 159), reversed.

(Argued February 28, 1881; decided March 15, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 14, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 23 Hun, 159.)

This action was brought to recover damages for the death of James Knupfle, plaintiff's intestate, alleged to have been caused by defendant's negligence.

It appeared that the driver of one of defendant's ice wagons, which was drawn by mules, left them standing upon Atlantic avenue, in the city of Brooklyn, unfastened and unattended, while he went into a store. The deceased, a boy about five years old, was being drawn upon the sidewalk, in a small wagon, by another boy about his own age, who, as he got opposite the



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ice wagon, let the tongue of the little wagon drop, and it ran in between the mules and the ice wagon. The mules started up, and a wheel of the ice wagon passed over the deceased, killing him.

The further material facts appear in the opinion.

*Alfred E. Mudge* for appellant. The violation of the ordinance was not alone evidence of carelessness sufficient to charge the defendant. (*Brown v. Buff. & S. L. R. R. Co.*, 22 N. Y. 191; *Jetter v. Harlem R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. [N. S.] 29; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522.) In the absence of express power by charter, a municipal corporation can only enforce its ordinances by penalties. (Cooley's Constitutional Limitations [4th ed.], 235.) It cannot as to third parties create new duties, and thus make that negligence which was not negligence before. (*Fuchs v. Schmidt*, 8 Daly, 317; *Kirby v. Boylston Market Association*, 80 Mass. 249; *Heeney v. Sprague*, 11 R. I. 456; *Van Dyke v. Cincinnati*, 1 Disney, 532.) Under circumstances where the injured party had no right to rely upon the fact that the ordinance would be complied with, it is not competent evidence for any purpose. (*Baker v. Pendergast*, 32 Ohio St. 494.) As to whether it is negligence to leave "a horse untied or not in charge of some one in a public street," is a question of fact for the jury, depending upon the disposition of the horse and other circumstances attending each case. (*Wanser v. Del., Lack. & W. R. R.*, N. Y. Ct. of Appeals, February 24, 1880; *Albert v. Bleecker St. R. R. Co.*, 2 Daly, 389; *Gottwold v. Bernheimer*, 6 id. 212, 214; *Griggs v. Frankenstein*, 14 Minn. 81.) If there was any error in the admission of the ordinance, or in the charges excepted to, it certainly did work the defendant injury, and there should be a new trial. (*Foote v. Beecher*, 78 N. Y. 155.)

*William G. Cooke* for respondent. The ordinance was properly admitted in evidence, and the judge's charge as to its

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effect was right. (*Jetter v. Harlem R. R. Co.*, 2 Abb. Ct. of App. Dec. 458; *Beiseigel v. N. Y. C. R. R. Co.*, 14 Abb. Pr. [N. S.] 29.) At common law, leaving a team loose in the street is negligence per se, without reference to the ordinance. (*Morris v. Kohler*, 41 N. Y. 42, 46; *Lynch v. Nurdin*, 1 Ad. & Ell. [N. S.] 29; *Illidge v. Goodwin*, 5 Carr. & Payne, 190.) Evidence of a custom by which drivers in Brooklyn habitually violate the city ordinance and the law was properly excluded. (*Brown v. Newell*, 8 N. Y. 190; *Higgins v. Moore*, 34 id. 417; *Stoney v. Farmers' Trans. Co.*, 17 Hun, 579.)

. Per CURIAM. One of the principal questions litigated upon the trial of this action related to the alleged negligence of the driver of the defendant's team in leaving the horses untied in the street, which, it was claimed, was the cause of the death of the intestate. Among other evidence to establish such negligence, the plaintiff offered and introduced in evidence, against the objection of the defendant, an ordinance of the city of Brooklyn, prohibiting the leaving of any horse or horses attached to a vehicle standing in any street without a person in charge, or without being secured to a tying post. We think there is no question as to the admissibility of such testimony under the decisions of this court, and the exception taken to the ruling in this respect cannot be upheld.

A more serious question arises as to the effect to be given to the evidence referred to. At the close of the charge the plaintiff's counsel requested the judge to charge the jury that a violation of an ordinance of the city is necessarily negligence; and the judge replied: "It is; I have so told the jury; it is negligence;" and the defendant's counsel excepted. We think there was error in the charge thus made, and that the judge went too far in holding that a violation of the ordinance was negligence of itself.

The question presented has been the subject of consideration in this court, as will be seen by reference to the reported cases. In *Brown v. B. & State Line R. R. Co.* (22 N. Y. 191), the

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court charged the jury that if the injury occurred while defendant's train was running in violation of a city ordinance and at a rate of speed forbidden by it, and was occasioned by or would not have occurred except for such violation, the defendant was liable, and this direction was held to be error. This doctrine is, however, repudiated in *Jetter v. N. Y. & H. R. R. Co.* (2 Abb. Ct. App. Dec. 458), as well as in subsequent cases. In the last case cited it was held that a party in doing a lawful act, where there is no present danger, or appearance of danger, has a right to assume that others will conform their conduct to the express requirements of the law and not bring injury upon him by its violation. It is also strongly intimated that a violator of such an ordinance is a wrong-doer and necessarily negligent, and a person injured thereby is entitled to a civil remedy. The distinct point now raised was not, however, fairly presented by the charge to which exception was taken, which was not otherwise erroneous. In *Beisegel v. N. Y. C. R. R. Co.* (14 Abb. Pr. [N. S.] 29) it was held that it was some evidence of negligence to show that an ordinance was violated, and the charge of the judge upon the trial to that effect was upheld. In *McGrath v. N. Y. C. & H. R. R. Co.* (63 N. Y. 522), it was laid down that the violation or disregard of an ordinance, while not conclusive evidence of negligence, is some evidence for the consideration of the jury. In *Massoth v. D. & H. Canal Co.* (64 N. Y. 524), the cases are reviewed, and it was said to be an open question in this court whether the violation of a municipal ordinance was negligence per se; and it was held that the city ordinance being submitted to the jury with the other evidence as bearing upon the question, but not as conclusive, there was no error in the parts of the charge excepted to. The result of the decisions, therefore, is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence. The judge not only assented unqualifiedly to the request made, but he also said that it was negligence; and thus went further than to hold, within the cases cited, that it was evidence of negligence.

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The counsel for the plaintiff urges that even if erroneous, the charge worked defendant no injury. This position is based upon the theory that as the question was submitted to the jury as one of fact, whether the team was left loose and unattended, and as the judge had charged that the ordinance adds very little to what would have been the rule without it, and that it was negligence to leave a horse untied or not in charge of some one, in a public street, whether there is an ordinance or not, they must have found that they were so left, and, therefore, the plaintiff was entitled to a verdict. The difficulty about this position is, that the question, whether leaving the horses untied was negligence, was one of fact depending upon the circumstances attending the case, and while the jury may have found in favor of the defendant as to this, their verdict may have resulted from the charge made as to the effect of the ordinance. It cannot, therefore, be said that by the portion of the charge which has been considered the defendant was not prejudiced.

For the error in the charge, without considering the other questions raised, the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except MILLER and DANFORTH, JJ., dissenting, and RAPALLO, J., absent.

Judgment reversed.

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ANNA N. DWIGHT et al., Executors, etc., Respondents, v. THE GERMANIA LIFE INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE WASHINGTON LIFE INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE MANHATTAN LIFE INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE HOMOEOPATHIC LIFE INSURANCE COMPANY, Appellant.

THE SAME, Respondents, v. THE BROOKLYN LIFE INSURANCE COMPANY, Appellant.

The power of the Supreme Court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff as of the defendant.

The word "claim" in the provision of the Code of Civil Procedure (§ 531) providing that the court may "in any case direct a bill of the particulars of the *claim* of either party to be delivered to the adverse party," includes not merely a ground or cause of action upon which some affirmative relief is asked, but also, in case of a defendant, whatever is set up by him, based upon facts alleged as the reason why judgment should not go against him.

The said provision does not take away the power the court previously had of affixing a disability to disobedience of an order directing a bill of particulars.

In an action upon a policy of life insurance certain breaches of warranty in answering untrue questions in an application were set up as a defense, to wit, that the insured stated that he had made no other application for insurance which had been refused, whereas he had made such applications to companies unknown to defendant; also that he had not had bronchitis or spitting of blood, when in fact he had had both prior to the application; also that he had other insurance on his life in addition to those specified by him. The court, on motion for a bill of particulars, directed defendant to deliver to plaintiff's attorney a statement of the particular times and places at which it expected to prove

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that the insured had bronchitis and spitting of blood, also stating what other insurance in addition to those specified the defendant expects or intends to prove the insured had, specifying the name of the company and the date and amount of the policy ; also stating what applications for insurance were made which had not led to an assurance, specifying name of company, time when application was made, and date of application. The order also provided that defendant should be precluded from giving evidence on the trial of matter not specified in such bill of particulars. The General Term modified the order so as to allow defendant to give in evidence general admissions and declarations of the insured without regard to the bill of particulars. *Held*, that the court had power to grant such an order ; and that the granting of it in this case was not such an abuse of discretion as to authorize a review of it in this court.

The affidavits upon which the motion was made stated that plaintiffs do not know to what instances the said averments of the answer refer, but did not state that they do not know of some instances of the kind referred to. It was claimed that these allegations were not sufficient to authorize the court to entertain the motion. *Held*, untenable ; that the affidavits made a case for the exercise of the discretion of the court.

(Argued March 1, 1881; decided March 15, 1881.)

THESE were appeals from orders of the General Term of the Supreme Court, in the third judicial department, made May 4, 1880, modifying and affirming as modified orders of the Special Term, in each of the causes above entitled, which required the defendant to furnish a bill of particulars. (Reported below, 22 Hun, 167.)

Each action was brought upon a policy of insurance issued by the defendant upon the life of Walton Dwight, plaintiff's intestate.

In the cause first above entitled the answer set up among other things breaches of warranty as follows : That the application for the policy contained the following questions and answers :

"16. Has the party" (meaning the said Walton Dwight) "now or has the same ever had any of the following diseases : spitting of blood, bronchitis, consumption, liver complaint, rheumatism, etc. ?"

"And in answer to said question, the said Walton Dwight denied that he had ever had any of the said diseases specified, except rheumatism."

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"6. A. Whether the party to be assured is now or has been insured in this company; if so, state the number of the policy and the amount. B. Whether in other companies, in which, for what amount in each; state exactly on what kind of policy."

"That in answer to so much of said question as related to insurance in other companies, the said Walton Dwight stated and represented that he was insured in the 'New York Mutual,' thereby meaning and intending the Mutual Life Insurance Company of New York, by a fifteen years' endowment policy for \$10,000; in the Connecticut Mutual Insurance Company, on an ordinary life policy, for \$15,000; in the Washington, on an ordinary life policy, for \$10,000, and in the Equitable, on an ordinary life policy, for \$10,000."

"6. C. Whether an insurance has been applied for with this or any other company, without having led to an insurance? If so, with which companies? And for what reason did the application not lead to an insurance?" And that to said question the said Dwight answered "No."

"That \* \* \* in and by the said application it was declared by the said Walton Dwight that the answers given by him were fair and true answers to the questions put to him, and it was acknowledged and agreed by the said Dwight that the statements made and embodied in the answers to the questions contained in said application were to form the basis of the contract for insurance for which he then applied, and that any untrue or fraudulent answers and any suppression of facts in regard to his health should render the policy null and void, and forfeit all payments made thereon."

"That, prior to the application for the said policy, the said Walton Dwight had had bronchitis and spitting of blood; that at the time of the said application the said Walton Dwight, having applied to the Mutual Life Insurance Company of New York for a policy on the life plan, had failed to obtain such policy, and that the said Mutual Life Insurance Company of New York refused to issue any policy upon the life of the said Dwight; that the said Dwight, at the time of the said application, and at the time of making the statements hereinbefore

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mentioned, had not, and never had, a policy in the Connecticut Mutual Life Insurance Company for \$15,000, or any sum, and that at the time when said application was made the said Dwight had other insurances upon his life in addition to those specified by him, which fact he suppressed, and had made applications for insurance to one or more companies to this defendant unknown, which had led to an assurance."

The order of the Special Term required that the defendant deliver, to the plaintiff's attorneys within twenty days after entry and notice of order, a statement in writing, under oath, stating the particular times and places at which the defendant expects or intends to prove that said Walton Dwight had bronchitis and spitting of blood, also stating what other insurance upon his life, in addition to those specified by him in his application, the defendant expects or intends to prove that said Walton Dwight had at the time when said application was made, specifying particularly the name of each company, also stating what applications for insurance to one or more companies which had not led to an assurance the defendant expects or intends to prove that said Dwight had made at the time when said application for the policy, upon which this action is brought, was made, specifying particularly the name of each company, etc.; and that defendant be precluded from giving evidence in regard to such matters upon the trial other than is so specified in such bill of particulars.

The General Term modified this order by adding thereto a clause directing that "neither any bill of particulars nor any thing in the order shall be construed as to prevent or have the effect of preventing the defendants from giving evidence of any declarations or statements, oral or written, made by the said plaintiff's testator, Walton Dwight of his having had bronchitis or spitting of blood, \* \* \* which declarations or statements were general as to the times and places when and where the said Walton Dwight had said ailments, \* \* \* or from giving evidence of any other confessions of said Dwight, which are otherwise admissible, \* \* \*



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which confessions are general as to the times and places of the matters in said confessions mentioned and confessed."

The answers in the other cases and the orders were similar.

*Jos. Larocque* for the Germania Life Insurance Company, appellant. The term "claim," as used in the last subdivision of section 531 of the Code of Civil Procedure, is synonymous with the word "demand," or "cause of action." (Code of Civil Procedure, §§ 500, 507; *Orvis v. Dana*, 1 Abb. N. C. 269.) A party is not bound to furnish matters of evidence to his adversary, which evidence, in itself, does not constitute a cause of action. (*Willis v. Baily*, 19 Johns. 268.) The question as to the power of the court to make the order appealed from is one of law, and an appeal thereon lies to this court. (*Tilton v. Beecher*, 59 N. Y. 176.)

*James Thomson* for the Washington Life Insurance Company, appellant. Under the common law and the Code of Procedure bills of particulars were confined to demands for affirmative relief. (*People v. Monroe*, 4 Wend, 200; 2 Paine & Duer's Pr. 152.) All matters which a defendant might plead, by reason of which he would be entitled to defeat a plaintiff's recovery, other than counter-claims, are defenses. (Code of Civil Procedure, §§ 507, 511, 512.) To constitute a claim, in any proper sense of the term, there must be an affirmative demand. (Abbott's Law Dict., Claim; *Lawrence v. Miller*, 2 N. Y. 245, 254; *Jackson v. Losee*, 4 Sandf. Ch. 381; *Kneedler v. Steinberger*, 10 How. Pr. 67.) Under the Code, the time and place of a material traversable fact need not be stated, unless it is essential to the cause of action. (*People v. Ryder*, 12 N. Y. 433; Bliss on Code Pleading, § 296.) Leaving out of view every other consideration, the plaintiffs' own papers wholly failed to make a case entitling them to the order. (*Strong v. Strong*, 1 Abb. Pr. [N. S.] 233, 238; *Willis v. Bailey*, 19 Johns. 268.) This court reviews errors, not otherwise appealable, where the decision of the court below is

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founded upon an erroneous view of its power to act, or of the law. (*Tilton v. Beecher*, 59 N. Y. 176; *Equitable Life Assurance Society v. Stephens*, 63 id. 341; *Morris v. Wheeler*, 46 id. 708; *West Side Bk. v. Pugsley*, 47 id. 368; *Hanover F. Ins. Co. v. Tomlinson*, 50 id. 215.)

*James Otis Hoyt* for the Manhattan Life Insurance Company, appellant. The court had no power to order a bill of particulars of a defense which was not a claim. (Code of Civil Procedure, § 531; *Orvis v. Dana*, 1 Abb. N. C. 268.) The plaintiffs, having shown that they have actual knowledge of sufficient facts to show them the particulars of the proposed defense, have not made such a case upon the papers as will allow the court to order a bill of particulars. (*United States v. Tilden*; *Tilton v. Beecher*, 59 N. Y. 186-7; *Blackie v. Neilson*, 6 Bosw. 681-3; *Orvis v. Dana*, 1 Abb. N. C. 285; *Norlock v. Lediard*, 10 M. & W. 677; *Pringle v. Leverich*, 10 N. Y. W'kly Dig. 296.) The order is appealable to this court. (*Ogdensburgh & L. G. R. R. Co. v. V. & C. R. R. Co.*, 63 N. Y. 176.) The court had no power to preclude defendant from giving evidence of particulars of defense upon the trial, not stated in the bill of particulars, which might subsequently come to its knowledge, and by its order deprived defendant of a substantial right. (*Dooley v. Royal Baking Powder*, 1 Law Bulletin, 18.)

*William Henry Arnoux* for the Metropolitan Life Insurance Company and The Homœopathic Mutual Life Insurance Company, appellants. A bill of particulars is, in its nature and scope, an enlargement and amplification of a pleading, and whatever cannot properly be embraced in a pleading cannot properly be directed by a court to be included in a bill of particulars. (*Matthews v. Hubbard*, 47 N. Y. 429; *Melvin v. Wood*, 3 Keyes, 533; *Pickering v. De Rochemont*, 45 N. H. 67; *Dean v. Mann*, 28 Conn. 352; *Davis v. Freeman*, 10 Mich. 188; *Bowman v. Earle*, 6 Duer, 691, 694; *People v. Monroe*, 4 Wend. 200; *Davis v. Free-*

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man, 10 Mich. 188; *Fleuret v. Durand*, 14 Johns. 329; *Gilpin v. Howell*, 5 Penn. St. 41, 52; *Brown v. Calvert*, 4 Dana, 219; *Canal Co. v. Knapp*, 9 Pet. 541, 564; *Starkweather v. Kittle*, 17 Wend. 20; *Hall v. Sewell*, 9 Gill [Md.], 146; 1 Phillips on Evidence, 799, 801 [4th Am. ed.]; *Mercer v. Sayre*, 3 Johns. 246.) A bill of particulars is so much a part of the complaint that in several of the States it has been held that it is too late to demand a bill of particulars after defendant has answered. (*Whitall v. Vaughn*, 3 Johns. L. R. [2 Penn.] 217; *Rice v. Annot*, 8 Gratt. 537; *McCarthy v. Mooney*, 41 Ill. 300; *Waterman v. Matlan*, 5 Fla. 211, 213; *Long v. Kinard*, Harp. 47; Tidd's Pr. 534; 6 Term R. 597.) Facts only are to be set forth in pleadings, and not the evidence which will be required to prove the existence of those facts, or the subordinate facts, which are the means of producing the state of facts relied on; and, in alleging a fact, it is not necessary to state such other facts as tend to prove the allegation. (*Boyce v. Brown*, 7 Barb. 80; *Williams v. Wilcox*, 8 Ad. & El. 314, 331.) The court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party. (Code of Civ. Proc., § 531; *King v. Cator*, 4 Burr, 2026; *Bartlett v. King*, 12 Mass. 545; *Ellis v. Paige*, 18 id. 43; *Nichols v. Squire*, 22 id. 168; *Commonwealth v. Cooley*, 27 id. 36; Sedgwick's Stat. and Const. Law, 126.) At common law the defendant could not be compelled to furnish a bill of particulars. (3 Bl. Com. 296; Co. Litt. 127.) A counter-claim is a claim which would constitute a cross-action, or upon which defendant might have maintained an action, and which, if successful, would defeat, diminish or in some way qualify plaintiff's recovery. (*Nat. Fire Ins. Co. v. McKay*, 21 N. Y. 199; *Jarvis v. Peck*, 19 Wis. 74; *Holzbauer v. Heime*, 37 Mo. 443; *Hay v. Short*, 49 id. 139; *Dietrich v. Koch*, 35 Wis. 618; *Mattoon v. Baker*, 24 How. 329; *Prouty v. Eaton*, 41 Barb. 409.) The right of plaintiff to claim and defendant to counter-claim must be reciprocal, for there can be no counter-claim where the plaintiff has no claim. (*Meyer v. Second*

## Statement of case.

*Ave. R. R. Co.*, 8 Bosw. 309; *Bellinger v. CRAIGUE*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 116.) It is broader and more comprehensive than set-off or recoupment. (*Vassar v. Livingston*, 13 N. Y. 248, 256; affirmed, 4 Duer, 285.) It embraces both set-off and recoupment. (*Wilder v. Boynton*, 63 Barb. 547; *Pattison v. Richards*, 22 id. 143; *Clinton v. Eddy*, 1 Lans. 61; *Leavenworth v. Packer*, 52 Barb. 132.) Throughout the Code the fixed and unalterable meaning of the word "claim" is the assertion of a legal right which may be the foundation of a remedy in any legal proceeding. (§§ 481, 501, 206, 701; *Brewster v. Sackett*, 1 Cow. 572.) It cannot be contended successfully that this court has no jurisdiction over this order on the ground of the insufficiency of the affidavit. (*Steuben Co. Bank v. Alberger*, 78 N. Y. 252.) Before ordering the bill of particulars we should have a bill of discovery. (*Yongs v. De Mott*, 1 Barb. 30.)

*Augustus Ford* for the Brooklyn Life Insurance Company, appellant. The order of the General Term is appealed to this court. It decides a question of practice affecting a substantial right and not resting in discretion. (Code Civ. Proc., § 190, subd. 2; *Lawrence v. Farly*, 73 N. Y. 187; *Tripp v. Cook*, 26 Wend. 152; *Platt v. Monroe*, 34 Barb. 293; 10 Abb. [N. S.] 416, Court of Appeals.) The power to order a bill of particulars of a party's claim ought not to be exercised to exclude a meritorious defense, nor for the purpose of furnishing evidence to the opposite party. (*Gee v. Chase M. Co.*, 12 Hun, 630; *Strong v. Strong*, 1 Abb. Pr. [N. S.] 238; *Willis v. Bailey*, 19 Johns. 268.) A bill of particulars is to prevent surprise, not to furnish evidence. (*Fullerton v. Gaylord*, 7 Robt. 551; *Drake v. Thayer*, 5 id. 701.) Where, from the nature of the action, it appears that the party seeking the particulars knows as well as the adverse party the details he seeks, an application for an order for a bill of particulars will be denied. (*Blackie v. Neilson*, 6 Bosw. 681.) The plaintiffs were not entitled to a bill of particulars on the moving papers. (*Orvis v. Dana*, 1 Abb. N. C. 285; *Willis v. Bailey*, 19 Johns. 268;

## Statement of case.

*Depew v. Leal*, 5 Duer, 663; *Blackie v. Neilson*, 6 Bosw. Fullerton v. Gaylord, 7 Robt. 551.)

*Henry Smith* for respondents. The only question presented for review in this court is, whether the Supreme Court had power to make the order from which the appeal is brought. (*Tilton v. Beecher*, 59 N. Y. 180; *People v. Tweed*, 63 id. 194; *Livermore v. Bainbridge*, 56 id. 72; Code of Civ. Proc., §§ 1324, 190 [2].) The Special Term had power, under the statute, to make an order for a bill of particulars of matters alleged in defense. (Code of Civ. Proc., § 531; *Tilton v. Beecher*, 59 N. Y. 176.) The assumption by appellant that the word "claim," as used in this section of the Code, does not apply to matter alleged in a defense, and is only applicable to causes of action and counter-claims, is untenable. (*Orvis v. Dana*, 1 Abb. N. C. 281, 282.) It is the practice to order bills of particulars of matters alleged in defense. (*Eberhardt v. Schuster*, 6 Abb. N. C. 141; *Diossy v. Rust*, 11 Weekly Dig. 102.) The court would have had power to grant a bill of particulars under the old practice, even though the restricted signification should be applied to the word "claim," as used in section 531. (*Tilton v. Beecher*, 59 N. Y. 180; *Orvis v. Dana*, 1 Abb. N. C. 281, 282; *Marshal v. Emperor Life*, 6 Best & S. 886; L. R., 1 Q. B. 85; *McCreight v. Stevens*, 1 H. & C. 452; *Pitts v. Chambers*, 1 F. & F. 684; *West v. West*, 4 S. & T. 22; *Jackson v. Hillas*, 4 Irish [Eq.], 60; *Jones v. Bewicke*, L. R., 5 C. P. 32; *Combe v. Stephenson*, 31 L. T. R. [N. S.] 585; *Ireland v. Thompson*, 4 Bing. N. C. 940; *S. C.*, 6 Scott, 601; *Owen v. Nickerson*, 3 E. & E. 601; *Doe v. Duke of Newcastle*, 7 T. R. 332, note; *Bain v. McKay*, 5 U. C. Pr. 465; *Wood v. Wood*, 2 Pai. 112.) The court had the power to make the order in question, and to prescribe a penalty for disobedience to it. (*Com. v. Snelling*, 15 Pick. 321; *Bowman v. Earle*, 3 Duer, 691; *Kellogg v. Paine*, 8 How. Pr. 329.) The form of the order is a question of practice, which involves no substantial right, and which this court will not review. (*Hanover F. Ins. Co. v. Tomlinson*, 58 N. Y. 651.) It is proper

practice to impose a penalty for disobedience to the order. (*Ibbett v. Seaver*, 4 Dowling & Lowndes, 716; *Young v. Geiber*, 6 C. B. 552; *Com. v. Snelling*, 15 Pick. 321.)

FOLGER, Ch. J. These appeals, from orders directing the defendants to furnish bills of particulars of the matters alleged as defenses, bring up two questions. *First*. Is there power in the Supreme Court to grant such an order in such a case, and is such an order, therefore, discretionary with that court, and *prima facie* not reviewable here? *Second*. If that question be answered in the affirmative, are these orders an abuse of the discretion of the court, so as to make them the subject of review by this court?

First. Unless changed by statute law, the power of the Supreme Court to order bills of particulars is not confined to actions upon demands for money, made up of various items. It extends to all descriptions of actions, when justice demands that a party should be apprised of the matter for which he is to be put for trial, with more particularity than is required by the rules of pleading. (*Tilton v. Beecher*, 59 N. Y. 176.) Nor is this power confined to an exercise of it in behalf of the defendant in an action. In favor of the plaintiff, as well, the court may order the defendant to give the particulars of the facts which he expects to prove. Thus, on a plea of fraud and consequent repudiation by the defendant, he has been compelled to give particulars of the acts of fraud and repudiation (*McCreight v. Stevens*, 1 H. & C. 454; *Pitts v. Chambers*, 1 F. & F. 684); on a plea of undue influence, particulars of those exerting the influence (*West v. West*, 4 S. & T. 22; *Jackson v. Hillas*, 4 Irish [Eq.], 60); on a plea of justification to an action for a libel charging perjury, particulars of the matters of justification (*Jones v. Bewicke*, L. R., 5 C. P. 32); in ejectment (*Doe v. Newcastle*, 7 T. R. 332, note). The power has been exercised, even in a criminal case, in favor of the Commonwealth, and against the prisoner. See *Com. v. Snelling* (15 Pick. 321), where, on an indictment for libel, the defendant was ordered to give particulars of the instances of

misconduct in the person libeled that he expected to prove, and was confined in his proof, on the trial, to the instances definitely specified in the bill furnished. In that case are citations of civil actions in which the defendant was required to give particulars of what he would attempt to prove. It is a power incident to the general authority of the court in the administration of justice. (Id.) It is the same power, in kind, that courts have to grant a new trial on the ground of surprise. The latter is remedial and curative. The former is preventative. But both have the same purpose, to reach exact justice between the parties, by learning just what is the truth, and to learn what is the truth, by giving to each party all reasonable opportunity to produce his own proofs, and to meet and sift those of his adversary. Thus, where, in an action for seduction, the female had sworn to the coition on a particular day, affidavits, showing an *alibi* and surprise, were held to make good ground for a new trial. (*Sargent v. ———*, 5 Cow. 106.) Now, would the plaintiff there have been in a worse plight if, before the trial, the court had ordered him to give a bill of the particular occasions on which he expected to prove copulation? The same end was reached by granting a new trial as could have been by ordering the particulars. And the same rule would apply, in the case of a plaintiff seeking a new trial against a defendant, for surprise by the testimony of the latter. But it is said that though the power may once have been in the courts, by reason of recent statutory provisions, it is not there now. The 531st section of the new Code touches this subject. It is claimed that by it the power is taken away, if the courts ever had it. That section provides that the court may, in any case, direct a bill of particulars of the *claim of either party* to be delivered to the adverse party. If it should be conceded that there is no power left in the court other than that which this section gives, still we do not assent to the claim made. The strength of the defendants' position is, in the definition they give to the word "claim," found in the section. It is contended that the word is synonymous with "demand," and "cause of action," and that it was intended to express by it only the ground, or cause of

action, on which some affirmative relief is asked of the court, and in cases only in which affirmative relief is asked.

We do not think that it is so restricted in purpose as that. In our view the claim spoken of by that section, where the case of a defendant is in hand, is whatever is set up by him as a reason why the action may not be maintained against him. The claim of the defendant, is that ground of fact which he alleges in his answer as the reason why judgment should not go against him. His claim, in the case, is the position he takes in his pleading, based upon the facts he sets up, and the law applied thereto, why he should go without day. We have used the word, in some of its forms, twice in this paragraph as expressive of a meaning as broad as that, and no doubt have been understood. There is no reason for saying that the intention of the legislature was to use the word with a narrower meaning. When section 531 was passed, the draughtsmen of the new Code had before them the case of *Tilton v. Beecher* (*supra*), and the cases cited in it. That case had been decided under the old Code, and with section 158 of that Code in mind. That section does not differ, in substance, from section 531 of the new Code. The framers of section 531 knew the power that the courts had to order bills of particulars, as shown by the opinion and judgment in that case. If it was meant by them to take away or narrow that power, there would have been some expression of an intention so to do. We find no indication, either in the section itself, or in any annotation on the section, that there was such purpose. The general purpose of the Code was, or should have been, to embody, in apt words, a declaration of the law as it was. If the purpose of any section was more than that, and was to change the law as it was, and to take away judicial power then possessed, we should find some hint of it in the section, or in reports accompanying it, or in annotation upon it. Besides, section 4 does continue, in the courts, the exercise of the jurisdiction and powers then vested in them by law, according to the course and practice of the courts, except as otherwise prescribed. Section 531 is not, in terms, prohibitory of the



power, and may not be said to prescribe otherwise. Nor is there warrant for the contention, that the Code withholds power, unless the defendant seeks affirmative relief. That would be to make the power depend upon an incident merely. Suppose that the defendant, in any case, should, in his answer, ask judgment for a perpetual injunction on the same facts which he set up as a defense. This would be invoking affirmative relief. That alone would not bring the case within section 531, and give power to the courts. The existence of the power is not got from the prayer of the answer, but is inherent in the court, or recognized and preserved by the Code, or both. It would not keep in view the real purpose of ordering particulars, and the real purpose of the existence and exercise of the power, to hold that in such case particulars could be ordered, while, if the defendant waived or struck out his prayer for an injunction, it could not.

That purpose, as we have seen, is to reach justice between the parties by evolving the truth from their discordant statements, and to give the parties every reasonable facility for coming to the trial, fully prepared for all that may be produced by the other side. This is just as important, whether the matter is set up as a bare defense, or as a basis for a demand for affirmative relief.

The orders in these cases provide that the defendants be precluded from giving evidence on the trial, of matter not specified in the bill of particulars furnished. It is urged that the Special Term had no power to affix this penalty to a failure or an inability to furnish a complete bill. The contention is based upon the reading of the 531st section. The first clause of that provides that on demand a copy of the account pleaded must be furnished. The second clause provides that a failure to do so will preclude from giving evidence of the account. The third clause provides for an order by the court to furnish a further account when the first one is defective. The fourth clause is the one we have already stated, that the court may, in any case, direct a bill of the particulars of the claim of either party to be delivered. Now because the sec-

tion does not anywhere but in the second clause speak of a penalty on non-delivery of a bill of particulars, it is argued that the Code meant that the courts should have no power to affix one. Clearly, the courts have power, by the Code, to grant an order for a further account, and for a bill of the particulars of the claim of either party. If the Code keeps from the court the power to affix a penalty to failure to obey its order, it is only by not repeating the clause giving the penalty. That would be to give more force to a demand of a party for an account, than to the order of the court for a further account. This would be absurd. There should follow the same penalty for not furnishing a further account when ordered, as there does for not giving a first account when demanded. There is power in the court to order that it shall follow. And if there is that power in making an order for a further account under the third clause, there is the same power in making an order for the particulars of a claim under the fourth clause.

The Code did not mean to take away the power, which courts always have had, of affixing a disability to disobedience of such orders. It was needed that it should enact the penalty for failure to comply with a demand of a party, but it was not needed that it should in terms give a power that the courts had always possessed. Besides, the bill of particulars is in aid of the pleading; it is sometimes called an amplification of the pleading. The particulars are considered as incorporated with the pleading (*Fleurot v. Durand*, 14 Johns. 329; *Van Vechten v. Hopkins*, 5 id. 211), and on production of the order and proof of the delivery of the bill, the parties are not allowed to give evidence out of it. (*Holland v. Hopkins*, 2 B. & P. 243; *Hurst v. Watkis*, 1 Camp. 69.) It is an exercise of the same power, to preclude in the order proof of matter not specified in the bill of particulars. It matters not whether the power is exerted by a declaration in the order, or by a ruling from the bench on the trial.

There are arguments *ab inconvenienti* made against the existence of the power. These are drawn from the alleged difficulty of preparing a complete bill of particulars in the short

time allowed a defendant to answer, and thereafter to comply with an order ; and from the difficulty of making an exact and comprehensive bill of particulars before full and precise preparation for trial and for proof of the defense has been made. These difficulties must attend in greater or less degree any case in which a defendant can be ordered by the court to furnish a bill. As it is shown that there are cases in which the court has power to make an order upon the defendant to give particulars, it follows that these are not legitimate arguments against the existence of power to order, but rather for the favor of the court as to the terms and conditions of the order.

It is also urged that the allegations of the plaintiffs' affidavits are not sufficient to set the courts in motion. We think that the papers before the Special Term were enough to authorize the courts below to entertain the motions. It is said that the plaintiffs state no more in those affidavits than that they do not know to what instances the averment of the defendants' pleadings refer, while they do not state that they do not know of some instances of the same kind with those averred. But grant that the plaintiffs know of instances ; they may be fully prepared to show that they are innocuous to their right of action. The instances which they know of may or may not be the same of which the defendant has knowledge or information ; hence it is for the court to say in its discretion whether they should be informed. Therefore, the affidavits, in averring an ignorance of the one class, while not averring an ignorance of any, do make a case for the discretion of the court. (See *Snelling v. Chennells*, 5 Dowl. 80 ; *S. C.*, 12 Leg. Obs. 75.) The position of the defendant is, that as it may be assumed that the plaintiffs have knowledge of some instances, it may be further assumed that they must be the same of which the defendant has information ; or upon another assumption, that the instances do, in fact, exist, and that, therefore, the plaintiff cannot be ignorant of them. It is plain that the first assumption is not of necessity correct. The second is to assume the truth of the very issue to be tried, as it is raised by the verified pleadings of the parties, which were parts of

the moving papers. We conclude, then, that the courts below had power to make orders that the defendants furnish statements of the particulars, and that the granting of them rested in the discretion of those courts.

Second. It remains, then, to inquire whether that discretion has been abused. Taking the cases and the orders in their general aspect, it cannot be said that it has. The defenses set up and the manner of pleading them are such, that manifestly the plaintiffs would go down to trial at some hazard of being taken by surprise, if there were not given to them some more specific statements than the answers open, of the time and place and other circumstances of the occurrences alleged in most general terms. It was a discreet exercise of power to order that more specific statements be given.

But objections are made to the terms and conditions of these orders, as directing either impossibilities, or acts that will be highly detrimental to the defense of the defendants. The orders direct that the bills state the particular times and places at which the deceased had bronchitis and spitting of blood. If this was to be so construed as requiring a statement of the very day or days, and the very houses of abode or buildings of business, on and at which he had the disease or raised the blood, there would be force in the complaint that it is impossible. It is not to be so construed. The times, in a true construction of the order, are the spaces of time, and the places are the municipal localities. Surely if the defendants have been informed so as to aver, and verify the averment, that Dwight had bronchitis and spit blood, they must have information specific enough to comply with such a requirement. Nor would a statement thereof imperil a defense beyond a peril to which it should be exposed, that of having the testimony to sustain it, met by countervailing testimony covering the same space of time and as to the same localities. It surely is not more hazardous than to have met the new trial granted on the ground of surprise in 5 Cow. (*supra*). To state the other insurances upon the life of Dwight, or the other applications for insurance, is easy if they are known or information has been had of them;

and we see no likelihood of unreasonable hazard to the defense by doing it. Nor do we see that the order calls for a disclosure of the evidence on which the defendants rely to support their defense. A statement would not disclose whether the evidence would be oral or written, nor who would give the oral testimony, nor the nature or source of that in writing. And these remarks apply *mutatis mutandis* to the other matters contained in the various orders. And it is always to be borne in mind, that these orders are to be read and used, and action under them is to be had, in accordance with settled rules of practice, which are safeguards to parties on either side. In the words of Lord MANSFIELD: "The bill of particulars must not be made the instrument of injustice, which it is intended to prevent." (*Millwood v. Walter*, 2 Taunt. 224. See, also, *Hurst v. Watkis*, 1 Camp. 69, note; *Lovelock v. Cheveley*, 1 Holt's N. P. 552.)

We are not required to say, and we do not say, that in the exercise of discretion we would have granted orders as minute in some points as are the orders in these cases. If they are likely to be oppressive upon the defendants, application for relief will doubtless be considerably met by the Special Term. The purpose of the court below is to secure a fair and well-advised trial of an important and substantial controversy, after due preparation for what will be shown on either side; and the ear of the court will be open to any reasons that will convince it that further action is called for to that end.

These considerations bring us to the conclusion that the appeals in these cases should be dismissed.

All concur, except FINCH, J., taking no part, and RAPALLO, J., absent.

In the cases against The Manhattan Life Insurance Company, DANFORTH, J., took no part.

Appeals dismissed.

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Statement of case.

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COTTON W. BEAN, Respondent, v. ELIZABETH A. EDGE, as Administratrix, etc., Appellant.

B., who had leased a hotel in New Jersey of defendant's intestate, and who owned the furniture, leased the hotel and furniture for the unexpired term to E. for a sum specified in addition to the rent as it accrued under the lease to B. E. agreed to keep the furniture insured, and not to sell, remove, or permit the same to be removed; B. agreed that upon payment of the rent and performance of the covenants by E., he would, at the expiration of the term, sell and convey the furniture to E. In case of default on the part of E., B. was authorized to re-enter and take possession of, and to sell the furniture at auction, retaining out of the proceeds the amount of rent unpaid, paying over the surplus to E. B. subsequently transferred his interest in the lease to plaintiff, and assigned to him his interest in the furniture. Defendant's testator caused the furniture to be distrained for non-payment of rent under the statute of New Jersey, which authorizes a landlord to seize for rent in arrears, within six months after the same becomes due, the goods of his tenant on the demised premises, but not those of any other person, although in the possession of the tenant. In an action for conversion of the furniture, *held*, that the transaction between B. and E. as to said furniture was a conditional sale the title remaining in B. until performance by E.; that no such interest was transferred to E., as rendered the property subject to be distrained for rent due from him; and that the transfer from B. vested the title in plaintiff, and upon default made by E., he had a right to take possession.

(Argued March 7, 1881; decided March 15, 1881.)

APPEAL from judgment of the General Term of the Superior Court in the city of New York, entered upon an order made December 6, 1880, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover damages for the alleged taking and conversion of a quantity of furniture.

In March, 1857, George W. Edge, defendant's intestate, leased a hotel, situate in Jersey City, to one Moses Bean, for five years from May 1, 1857.

Bean entered into possession of the demised premises; he had in the hotel the furniture in question. On the 1st day of November, 1860, Bean let the hotel, and the

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Statement of case.

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furniture in it, to one Henry G. Ely, from the 1st day of November, 1860, to May 1, 1862; Ely to pay as rent for the hotel and furniture \$3,500; \$500 on delivery of the lease; a note for \$500, dated November 1, 1860, payable at two months, indorsed by Eleazur S. Ely; and five like notes, payable in six, nine, twelve, fifteen and eighteen months; and also to pay the rent, which from time to time was to become due, to Edge under Bean's lease from him. Ely was also to pay taxes, keep the furniture insured in Bean's name for \$3,000, carefully to use it, and not sell, remove, or permit any to be removed, from the premises. The lease to Ely further provided that if Ely failed to pay Bean any of the rent reserved, or should make default in any of the covenants in the lease, then Bean or his representatives might re-enter upon the land and take the furniture "as of his former estate," excepting that the goods should be sold at auction and Bean should deduct the amount unpaid upon the notes and such rent as might be due to Edge, and the surplus, if any, should be paid to Ely. On November 27, 1860, said Bean, for value, transferred four of the Ely notes to plaintiff, and at the same time executed and delivered to him a written assignment of all his right, title and interest in and to the agreement with Ely, with authority to ask, demand, sue for, etc., "the money or goods and chattels that may be or become due thereon."

Ely failed to pay his notes which had been transferred to plaintiff. Whereupon plaintiff returned the notes to Bean, surrendered by writing and delivery the assignment of the Ely agreement, and received, May 8, 1861, a bill of sale, executed and acknowledged on that day by Bean, of the furniture, fixtures, etc. On April 14, 1862, defendant issued a warrant to a constable to distrain for \$731.55, rent in arrears. On May 2, 1862, defendant issued another warrant to the same constable to distrain for \$280.77, rent due. On May 3, 1862, plaintiff notified Edge, defendant's intestate, that the property in the house was his, and asked Edge to deliver it to him. Defendant refused to do so.

Further facts appear in the opinion.

## Statement of case.

*Hamilton Wallis* for appellant. The defendant was empowered by law to distrain the property in question for rent in arrears. (Dixon's Digest Laws of N. J. [4th ed.] 241, § 8.) This right exists, too, as between the original lessor, and a sub-tenant. (Id. 245, § 24.) Edge had a vested interest in the agreement; it was a security to Bean to protect him against his liability to Edge, of which Edge was entitled to the benefit. (*Lawrence v. Fox*, 20 N. Y. 268; *Gurnsey v. Rogers*, 47 id. 233; *Simson v. Brown*, 68 id. 355.) Ely held the property, but the proceeds of its sale were to be used in paying the debts due, or to be due to Bean and Edge. (N. J. Court of Errors and Appeals; *Youngs v. Trustees of Public Schools*, 4 Stewart, 299; *Berley v. Taylor*, 5 Hill, 533; *Lawrence v. Fox*, 20 N. Y. 268; *Kelley v. Roberts*, 40 id. 432; *Lowrey v. Steward*, 25 id. 239.) Defendant had a right to distrain this furniture, situated as it was. (*Hoskins v. Paul*, 4 Halst. 110; *Francis v. Wyatt*, 3 Burr. 1498.) If a party induces another to act or refrain from acting upon apparent facts, the law will not permit him to show the existence of another state of facts to the injury of the one who has so acted. (*Voorhis v. Olmstead*, 66 N. Y. 113; affirming, 3 Hun, 744; *Contl. Bk. v. Bk. of Commonwealth*, 50 N. Y. 575.) But if not technically estopped, Edge was, in the largest sense, a creditor of both Moses H. Bean and Ely. As against him no transfer of the title to this personal property was good without a change of possession. (*Edwards v. Harben*, 2 Term R. 597; *Bissell v. Hopkins*, 3 Cow. 181; *Bogardus v. Trinity Church*, 4 Paige, 198.)

*Nathaniel C. Moak* for respondent. The transaction was a conditional sale of the furniture by Moses H. Bean to Ely, and the owner, upon default by the purchaser, may repossess himself of the goods, and if any one detained the property from him, even under a purchase from the vendee, he could recover of such wrong-doer. (*Cole v. Mann*, 62 N. Y. 1; *Ballard v. Burgett*, 40 id. 314; *Hasbrouck v. Lounsbury*, 26 id. 528; *Grant v. Skinner*, 21 Barb. 581; *Brewster v. Baker*, 20 id.



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364; *Singer M. Co. v. Graham*, 8 Oregon, 19; *Knowlson v. Sprong*, 10 N. Y. Wkly. Dig 81, Gen. T., 3d Dept.; *Guilford v. McKinley*, 61 Ga. 230; *Duke v. Schackleford*, 56 Miss. 552; *Sage v. Slenty*, 23 Ohio St. 1; *McMillan v. Larned*, 41 Mich. 521; *Everett v. Hall*, 67 Me. 497; *Buckmaster v. Smith*, 22 Vt. 203.) Defendant was liable for converting the property. (*Davis v. Barker*, 5 Den. 92; *Herring v. Hoppock*, 14 N. Y. 409, 412-413; *Ball v. Loomis*, 29 id. 412, 417; *Pozzoni v. Henderson*, 2 E. D. Smith, 146; *Anglehart v. Rathier*, 27 U. C. Com. Pl. 97, 99, 102; *Haseler v. Lemoyne*, 5 C. B. [N. S.] 530; *Hope v. White*, 22 U. C. Com. Pl. 5, 9-10; *Bonnell v. Dunn*, 28 L. J. 154; *Wintringham v. Lafoy*, 7 Cow. 735; *Judson v. Cooke*, 11 Barb. 642, 644; *Coats v. Darby*, 2 N. Y. 517; *Green v. Kennedy*, 46 Barb. 16; *Lattimer v. Wheeler*, 3 Abb. App. Dec. 35, 42; *Boyer v. Brockway*, 31 N. Y. 490, 493; *Knapp v. Smith*, 27 id. 277, 280; *Stewart v. Wills*, 6 Barb. 79, 80-1; *Wintringham v. Lafoy*, 7 Cow. 735, 738; *Neff v. Thompson*, 8 Barb. 213; *Miller v. Baker*, 1 Metc. 27; *Woodside v. Adams*, 40 N. J. Law, 418, 430-1; *Farrar v. Chauffetete*, 5 Den. 527, 532; *Copley v. Rose*, 2 N. Y. 315, 117; *Connah v. Hale*, 23 Wend. 462, 466-7; *Fonda v. Van Horne*, 15 id. 631; *Ford v. Williams*, 24 N. Y. 359.) It was competent for Ely, after the breach of the November agreement, to relinquish his claim under it, without the consent of the defendant. (*Bedford v. Terhune*, 30 N. Y. 453; *Simpson v. Brown*, 68 id. 355; *Clark v. Dickinson*, 74 id. 47; *National, etc. v. Lodge*, 98 U. S. 123; *Hunt v. Strew*, 39 Mich. 363.) The plaintiff being the owner of the claim at the commencement of this action the subsequent transfer of his interest was no defense to this action. (Old Code, § 121; new Code, § 756; *Cuff v. Dorland*, 7 Abb. N. C. 194; *Packard v. Wood*, 17 Abb. 318.)

MILLER, J. The plaintiff's claim rests upon the title acquired from Moses H. Bean, who had leased certain real estate, to wit, a hotel situate in Jersey City, of the defendant's intestate, and was the owner of the furniture therein, for the value of

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Opinion of the Court, per MILLER, J.

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which a recovery was had in this action. Moses H. Bean leased the real estate for the unexpired term to one Ely, and also executed to him a lease thereof and an agreement in regard to the personal property, which gave him a right to use and to purchase it upon certain terms stated. If Ely performed all the conditions of the agreement at the end of the term, Bean also agreed to sell him the furniture, and if not, he, Bean, was authorized to repossess himself of the same. An assignment or instrument made on the 27th day of November, 1860, transferred the interest of Moses H. Bean to the plaintiff, in consideration of certain notes of Ely, which had been passed to the plaintiff, and was made more specific by a bill of sale of May 8, 1862, by which the interest of Moses H. Bean in the furniture was passed to the plaintiff. The rights of the parties must be considered, having in view the agreement with Ely and the transfers referred to, which were made to the plaintiff. The effect of the transfers was, I think, to vest in the plaintiff a title to the furniture, and upon a default being made by Ely, plaintiff had a right to take possession of the same. (*Cole v. Mann*, 62 N. Y. 1.) Nor does the provision of the agreement in regard to a re-entry and a sale, and the application of the proceeds to the payment of the notes and rents, transfer such a title to Ely as renders the property subject to Edge's claim for rents due and to become due, and it does not, we think, vest an interest in Edge for his benefit within the principles decided in *Lawrence v. Fox* (20 N. Y. 268), *Garnsey v. Rogers* (47 id. 233), *Simson v. Brown* (68 id. 355). The transaction as to the furniture was in effect a conditional sale of the same, and the title was not to pass until full payment therefor by Ely, and hence Edge had no right to insist upon payment of the rent due from the proceeds of the sale of the furniture. The original claim of plaintiff was acquired in November, 1862, and there was no rent distrained for by Edge, except what was said to be due in February, 1862. If this, as the defendant insists, includes some of the rent due on the first day of November, 1861, there were no arrears of rent until nearly a year after the original transfer to the plaintiff.

iff, and nearly six months after the bill of sale of the furniture of May 8, 1862. The title had certainly passed at the latter date, and the defendant's intestate had no claim for rent prior to the acquisition of an absolute title by the plaintiff, unless it can be upheld under the laws of New Jersey.

The statute of that State (Dixon's Digest of Laws, N. J. [4th ed.] p. 241, § 8) authorizes a landlord "to take and seize, as a distress for arrears for rent, any of the goods and chattels of his, her or their tenant or tenants, and not of *any person* or persons, although in possession of such tenant or tenants, which may be found on the demised premises," and also provides that "such distress must be made within six months after the same shall become due; or when the rent is payable by installments, then within six months after the rent becomes due." The statute cited is very explicit as to the rights of persons owning property in possession of the tenant, and fully protects them from seizure for rent, and the decisions of the courts of that State are in accord with its obvious meaning. (*Woodside v. Adams*, 40 N. J. Law, 417; *Allen v. Agnew*, 24 id. 443; *Hamilton v. Hamilton*, 25 id. 544.) The case of *Hoskins v. Paul* (4 Halst. 110) is relied upon as in conflict with the cases cited. Assuming that such is the fact, it is a sufficient answer to this position to say that the weight of authority is entirely adverse to the latter case and should control.

The claim of the defendant's counsel that the statute of New Jersey gives the landlord six months after the rent becomes due in which to make distraint, provided the property remains upon the demised premises, and, therefore, the rent in arrears on November 1, 1861, could be distrained for, upon any property then on the premises, is not well founded. The statute only limits the time, but does not in any form render property which has been sold before the warrant of distress has been issued liable to levy and sale.

The claim that the transaction was a scheme to defraud Edge presents a question of fact which is not reviewable upon this appeal.

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Statement of case.

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There was no error in any of the rulings as to the admission of evidence, and there is no other question in the case which demands especial consideration.

The judgment was right and should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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NICHOLAS F. PALMER et al., Executors, etc., Respondents, v.  
MATTHEW HORN et al., Appellants.

The will of H. gave to his executors such portion of his estate as should be necessary to carry out certain specified purposes, among them the following: "To divide the sum of \$20,000 into as many shares as there shall be lawful issue of my deceased nephew Matthew Horn, living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike." At the time of the execution of the will and of the death of the testator, there were living three children of said Horn, and seven grandchildren, two of them children of a deceased daughter. In an action for a construction of the will, *held*, that the provision did not include the grandchildren, either the children of the deceased child or of the living children; and that they took no interest under it.

(Argued March 1, 1881; decided March 15, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of January, which affirmed a judgment entered upon a decision of the court on trial at Special Term. (Reported below, 20 Hun, 70.)

This action was brought by plaintiffs as executors of the will of Francis B. Hegemen, deceased, to obtain a construction of certain clauses in his will. The only one in question here was the seventh clause which is set forth in the opinion, with the facts pertaining thereto.

## Statement of case.

*Milton A. Fowler* for appellant. The word "children" as used in the will is to be construed as meaning issue. (*Prowitt v. Rodman*, 37 N. Y. 42-58; *Mowatt v. Carow*, 7 Paige, 328.) In construing wills, the law favors that construction which will not tend to the disinheriting of heirs, unless the intent to do so is clearly expressed. That construction is to be adopted which inclines to the side of the inheritance of the children of a deceased child, who would be the natural heirs in the absence of a will. (*Scott v. Guernsey*, 48 N. Y. 106; *Lynes v. Townsend*, 33 id. 558; *Low v. Harmony*, 72 id. 408-414; 1 Redf. on Wills, 4, 5; *Ayerson v. Ayerson*, 3 Den. 461; 4 Kent, 419; *Rowe v. Underhill*, 4 Hun, 130; *Pemberton v. Parker*, 5 Binn. 601; *Bowne, Trustee, v. Underhill*, 4 Hun, 130.) When the word "issue" is used as a word of purchase, all the issue who can claim as descendants of the person to whose issue the bequest is made will be entitled equally, whether parents, children, or grandchildren. (*Davenport v. Hanberry*, 3 Ves. 257; *Freeman v. Parley*, 1 id. 421; *Bernard v. Montague*, 1 Meriv. 424; *Pemberton v. Parker*, 5 Binn. 601.)

*John Reynolds* for respondents. Neither Matthew Horn's deceased daughter Elmira, nor any of his grandchildren are included in the bequest in question. (*Rathbone v. Dyckman*, 3 Paige, 26; *Keteltas v. Keteltas*, 72 N. Y. 314, 315; *In re Hopkins' Trusts*, L. R., 9 Ch. Div. 131; *Carter v. Bentall*, 2 Beav. 551; *Baker v. Bayldon*, 31 id. 209; *Peel v. Catlow*, 9 Sim. 372 [1838]; *McGregor v. McGregor*, D. F. & J. 63 [1859]; *Ellis v. Selby*, 7 Sim. 352; *In re Mercerons' Trusts*, L. R., 4 Div. 182; *Hampson v. Brandwood*, 1 Mad. 388; *Hopson v. Commonwealth*, 7 Bush [Ky.], 647; *Thompson v. Ludington*, 104 Mass. 193; *Magaro v. Field*, 48 N. Y. 668.) The expression "issue" or "lawful issue" primarily and usually denotes "children" only. (2 Redf. Law of Wills, 37-38, note 5; id. 42, 43, §§ 7, 8, 9; id. 37, note 5, 38, 40, 42, 43; *Ralph v. Carrick*, L. R., 11 Ch. Div. 873; *Earl of Orford v. Churchill*, 3 V. & B. a. 67.) The expression "child" or "children" has the single definite meaning of immediate

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descendants or immediate issue. (2 Redf. Law of Wills [ed. 1876], 15, 16, 17, 18, 19; *Fleet v. VanAtta*, 21 N. J. Eq. 84 [1870]; *Master of the Rolls in* [1799]; *Reeves v. Bryner*, 14 Ves. Jr. 698; *Sherman v. Sherman*, 3 Barb. 387; *Magaw v. Field*, 48 N. Y. 668; *Lawrence v. Hebbard*, 1 Bradf. 255; *In re Goodman's Trusts*, 22 Alb. L. J. 272.) The one single case in which "children" will be held to include "grandchildren" is where there are no "children" to take, and unless grandchildren are permitted to take the intent of the testator would be completely frustrated and the bequests inoperative. (*Earl of Orford v. Churchill*, 3 V. & B. a, 69; *Mowatt v. Carow*, 7 Paige, a, 333; *In re Parker, Bentham v. Wilson*, 43 L. T. Rep. [N. S.] 115; *Prowitt v. Rodman*, 37 N. Y. 42; 2 Redfield's Law of Wills [ed. 1876], 15, 16, note; *Harris v. Lloyd*, Turn. & Russ. 310; 2 Redf. Law of Wills, 18; *Bentham v. Wilson*, 43 L. T. Rep. [N. S.] 115; *Wilson's Trusts*, L. R., 1 Eq. Cases, 264; *Gardner v. Heyer*, 2 Paige, 14; *Beachcroft v. Beachcroft*, 1 Mad. 430; *Collins v. Hoxie*, 9 Paige, 81; *In re Hopkins' Trusts*, L. R., 9 Ch. Div. 131; *Hone v. Van Schaick*, 3 N. Y. 538, 540.) Almira Berry herself, the deceased mother of the two grandchildren, never took, or could take any thing under the will, since she was dead four years before the will was made. (*Magaw v. Field*, 48 N. Y. 668; *Teed v. Morton*, 60 id. 506; *De Lassus v. Gaterwood*, 22 Alb. L. J. 335; *Kelsey v. Ellis*, 38 L. T. R. [N. S.] 471.)

EARL, J. This action was brought to obtain a construction of the will of Frances B. Hegeman, deceased. The seventh clause of the will only needs consideration upon this appeal, and that is as follows: "To divide the sum of twenty thousand dollars into as many shares as there shall be lawful issue of my deceased nephew, Matthew Horn, living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of the said children respectively, and as they respectively depart this life to pay over the principal of said share to their lawful issue, share and share alike."

The will was executed in 1876, and the testatrix died in 1877. At both dates there were living three children of Matthew Horn, the defendants, Mrs. Sutton, Mrs. Haight and Mrs. Ely. Another child of Matthew, Mrs. Berry, died in November, 1872, leaving two children, the appellants, Nellie Berry and Charles Berry, who at the death of the testatrix were under eight years old.

Mrs. Sutton, Mrs. Haight and Mrs. Ely claim that they are the "lawful issue" and "children" of Matthew Horn intended by the seventh clause of the will; and it is claimed on behalf of the two infant appellants that they also are included among "the issue" and "children" of Matthew, within the meaning of that clause. The Supreme Court has determined that they are not so included; and whether that determination is right, is the sole question for our solution.

The word "issue" is an ambiguous term. It may mean descendants generally or merely children; and whether in a will it shall be held to mean the one or the other, depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as can be considered. (*Doe ex dem. Cannon v. Rucastle*, 8 C. B. 876; *Ralph v. Carrick*, L. R., 11 Ch. Div. 873; *Earl of Orford v. Churchill*, 3 Ves. & B. 59, 67.) In England, at an early day, it was held, in its primary sense, when not restrained by the context, to be co-extensive and synonymous with descendants, comprehending objects of every degree. But it came to be apparent to judges there that such a sense given to the term would in most cases defeat the intention of the testator, and hence in the latter cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children. It will at least be held to have such meaning upon a slight indication in other parts of the will that such was the intention of the testator. (2 Jarmanon Wills [R. & T. ed.], 635; 2 Redf. on Wills [2d ed.], 34, 37 and note.) And substantially the same rule of construction prevails in this country. In 4 Kent's Com. 278, in a note, the learned chancellor said: "The term *issue* may be used either as a word of purchase or of limitation, but

it is generally used by the testator as synonymous with child or children."

Here it is clear from indications found in this will, that the testatrix used the term "issue" as synonymous with children. She did so in several clauses of the will, and in the very clause under consideration the words "said children" refer to the "lawful issue" before specified. By the word "children" the testatrix herself has interpreted the word "issue."

A case very much in point is *In re Hopkins' Trusts* (L. R., 9 Ch. Div. 131). In that case a testator by his will gave a fund to trustees, in trust for the lawful issue of F. H. surviving him, equally to be divided between them, if more than one, and if but one, then for such only child, with a gift over in default of issue of F. H. The issue of F. H. who survived him were a son, a daughter, four children of the son, and six children of a deceased daughter. It was held that by the use of the word "child" the testator had himself interpreted the word "issue," and that the word "issue" must be restricted to children, and that the fund should go in moieties to the surviving son and daughter. In *Baker v. Bayldon* (31 Beav. 209), a testator gave legacies to his nieces, with power to his executors to settle them on his nieces for life, and at their deaths for the benefit of their "issues." He also gave them his residue, with like power to settle it on his nieces and for the benefit of "their respective children," as provided with respect to the legacies. It was held that the testator, by the subsequent use of the word "children," had explained what he meant by the word "issues," and that the children of nieces took, to the exclusion of grandchildren. (See, also, *King v. Savage*, 121 Mass. 303, and *Taylor v. Taylor*, 63 Penn. 484.)

But the further claim is made that the word "children," in the seventh clause, was used in an enlarged sense, and was intended to include all the "issue" of Matthew Horn, immediate and remote, and hence the infant appellants. But such a construction would be unwarranted. It is a general rule that the word "children" must be understood, in wills, in its primary sense and simple signification, when that can be done, and always



when there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering such meaning of the term. Where the term has received a larger and more extensive construction, as synonymous with issue, it has generally been based upon something in the will, unless it resulted, as just intimated, from the fact that there were no children in existence. The rule is well stated thus in *Mowatt v. Carow* (7 Pai. 328): "The word 'children,' in common parlance, does not include grandchildren, or any others than the immediate descendants in the first degree of the person named as the ancestor. But it may include them where it appears there were no persons in existence who would answer to the description of children, in the primary sense of the word, at the time of making the will; or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word 'children' as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or stepchildren." (See, also, *Feit's Exrs. v. Vanatta*, 21 N. J. Eq. 84; *Reeves v. Brymer*, 4 Ves. 698; *Magaw v. Field*, 48 N. Y. 668.)

Here there are children of Matthew Horn to take. There is nothing in the context or extrinsic circumstances to show that the word "children" was used in an enlarged sense. The infant appellants are not disinherited by giving the word its primary sense, as they were not heirs of the testatrix, and were so remotely related that they would have taken none of her estate if she had died intestate. We have no means of ascertaining whether the testatrix had them in mind when she made her will, and actually intended that they should share in her bounty. It is enough to know that the language used, properly construed, does not include them.

The construction contended for would certainly defeat the intention of the testatrix, because that would bring in the three children of Mrs. Sutton, and two children of Mrs. Ely, all living at the date of the will, as well as the two appellants, to share equally with Mrs. Sutton, Mrs. Haight and Mrs. Ely; and

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thus the bequest in the seventh clause would be divided into ten shares, and the children of her nephew would be placed on a footing of equality with his grandchildren. It cannot be supposed that she intended such a disposition of her bounty.

The will was properly construed by the court below, and its judgment should be affirmed, with one bill of costs to the respondents who appeared in this court, to be paid out of the estate.

All concur.

Judgment affirmed.

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AARON McCONNELL, Appellant, v. FRANKLIN D. SHERWOOD, as Sheriff, etc., Respondent.

A general assignment for the benefit of creditors authorized the assignee to "collect the notes, accounts and choses in action and the taking the part of the whole when the party of the second part (the assignee) shall deem it expedient to so do." In an action by the assignee for the conversion of a portion of the assigned property *held*, that said provision, literally construed, simply authorized the assignee to receive payment by installments, not to satisfy a debt on payment of a portion; but even if the effect was to give power to compromise it did not invalidate the assignment.

The assignment authorized the assignee "to compromise with the creditors" of the assignor for all his debts and liabilities if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor. *Held*, that the effect and intent of this provision was to delay the payment of debts and create a trust for the assignor and so it rendered the assignment void. (3 R. S. 185, § 1; *id.* 187, § 1.)

*Jewett v. Woodward* (1 Edw. Ch. 195), and *Hone v. Henriques* (18 Wend. 240), distinguished.

(Argued March 4, 1881; decided March 15, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made January 6, 1880, which reversed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 19 Hun, 519.)

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This action was brought by plaintiff as assignee of one Ward H. Van Housen, for the alleged taking and conversion of a stock of goods which had been levied upon by defendant as sheriff of Steuben county, under and by virtue of executions against said Van Housen.

The assignment executed by Van Housen as party of the first part assigned to plaintiff as party of the second part all of the property of the former, "except such property as is by law exempt from execution, to have and to hold the same to the said party of the second part in trust, to sell and dispose of the said personal property and estate, and collect the notes, accounts and choses in action, and the taking a part of the whole when the party of the second part shall deem it expedient to so do, then, in trust, to dispose of the proceeds of said notes, accounts, and choses in action and property in the manner following, to wit :

*First.* To pay the costs and charges of these presents and the expenses of executing the trust declared and set forth herein. To distribute and pay the remainder of the said proceeds to all the creditors of the said party of the first part for all debts and liabilities which the said party of the first part may be owing or indebted to any person whatever, provided, however, that if there is not sufficient funds for the payment of all the debts of the said party of the first part, then the said debts are to be paid *pro rata* or in proportion to their respective demands.

*Third.* That the party of the second part may have the right to compromise with the creditors of the party of the first part for all his debts and liabilities, which the party of the first part may be owing or indebted to any person, if in the opinion of the second party it would be advantageous to the party of the first part and to the creditors of the party of the first part."

*M. Rumsey Miller* for appellant. The fair meaning of the third clause of the assignment is that the assignee may have authority or permission to compromise with all the creditors for

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all the debts if in his opinion it would be advantageous to the assignor and all the creditors. (*Heaton v. Wright*, 10 How. Pr. 83; Bouv. Law Dict., tit. "Compromise.") This authority would not render the assignment void, because it would only be of effect if all the creditors assented. (*Jewett v. Woodward*, 1 Edw. Ch. 195, 198; *Nicholson v. Leavitt*, 2 Seld. 517; *Dunham v. Waterman*, 17 N. Y. 17; *Raplee v. Stewart*, 27 id. 313; *Hone v. Henriques*, 13 Wend. 243; *People ex rel. Morris v. Randall*, 72 N. Y. 423; *Townsend v. Stearns*, 32 id. 214; *Ginther v. Richmond*, 18 Hun, 234; *Grover v. Wakeman*, 11 Wend. 208, 216; *Kellogg v. Slauson*, 1 Kern. 305; *Mann v. Witbeck*, 17 Barb. 388, 391, 392; *Southworth v. Sheldon*, 7 How. 414; *Clark v. Fuller*, 21 Barb. 129, 130; *Whitney v. Krows*, 11 id. 198, 201; *Nichols v. McEwen*, 21 id. 65, 66; *Townsend v. Stearns*, 32 N. Y. 217; *Benedict v. Huntington*, id. 219, 221, 222, 223.) The reservation of the surplus to the assignor after paying all the debts is not the creation of a trust for the grantor under the statute of personal uses. (2 R. S. 135, § 1, fols. 77, 93, 166; *Van Rossum v. Walker*, 11 Barb. 237; *Briggs v. Davis*, 20 N. Y. 15, 22; *Wintringham v. Lafoy*, 7 Cow. 738; *Ely v. Cook*, 18 Barb. 612, 614.) There was no reservation of right to pay future debts, or power to the assignee to pay future debts. The clause in the assignment refers only to debts existing at the time of making the assignment. (*Brainard v. Dunning*, 30 N. Y. 211, 214; *Benedict v. Huntington*, 32 id. 228; *Van Dine v. Willett*, 38 Barb. 319, 322.) The clause in the assignment authorizing the assignee in collecting notes, accounts, etc., belonging to the estate assigned, to "take a part for the whole when the assignee shall deem it expedient so to do," does not vitiate the assignment. (*Ginther v. Richmond*, 18 Hun, 231; *Bellows v. Patridge*, 19 Barb. 176; *Dow v. Platner*, 16 N. Y. 566; *Anonymous v. Gelpcke*, 5 Hun, 253, 254.)

*J. F. Parkhurst* for respondent. The assignment is void on its face by reason of the provision which gives the assignee the right to compromise with creditors. (Burrill on Assign-

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ments, 229; *Whalen v. Scott*, 10 Watts, 237-44; *Nicholson v. Leavitt*, 6 N. Y. 520; *Barney v. Griffen*, 2 id. 365; *Whitney v. Brows*, 11 Barb. 198; *Van Rossum v. Walker*, id. 237; *Litchfield v. White*, 3 Sandf. 545; *Townsend v. Stearns*, 32 N. Y. 215, 216; *Ogden v. Peters*, 21 id. 23.) Because it gives the assignee the right to give preferences. (*Wakeman v. Grover*, 4 Paige, 441; *Grover v. Wakeman*, 11 Wend. 203; Burrill on Assignments [3d ed.], 310; Bump on Fraudulent Conveyances [2d ed.], 419; Bishop on Insolvent Debtors, 193; *Hudson v. Maze*, 4 Ill. 578; *Smith v. Leavitts*, 10 Ala. 92; *Works v. Ellis*, 50 Barb. 512; *Keevill v. Donaldson*, 20 Kans. 165; *Bennett v. Ellison*, 1 Am. Insolvency Rep. 26; *S. C.* 23 Minn. 242; *Whitney v. Kelley*, 67 Me. 377; *Smith v. Hurst*, 10 Hare, 330; *Boardman v. Halliday*, 10 Paige, 227; *Barnum v. Hempstead*, 7 id. 568; *Van Nest v. Yoe et al.*, 1 Sandf. Ch. 4; *Sheldon v. Dodge*, 4 Den. 218; *Nichols v. McEwen*, 71 N. Y. 22; *Goodrich v. Downs*, 6 Hill, 438; *Southard v. Benner et al.*, 72 N. Y. 43; *Cavanaugh v. Beckwith*, 44 Barb. 192; *Benedict v. Huntington*, 32 N. Y. 223; *Nicholson v. Leavitt*, 2 Seld. 520; *Barney v. Griffen*, 2 Comst. 365; *Edgell v. Hart*, 9 N. Y. 219; *Mittnacht v. Kelley*, 3 Keyes, 407.) The assignee will not be permitted to show that he did not intend to avail himself of the authority given him in the instrument. (*Burney v. Griffen*, 2 Comst. 365; *Boardman v. Halliday*, 10 Paige, 223; *Goodrich v. Downs*, 6 Hill, 438.) It is contrary to the policy of the assignment law, that the assignee should be made the agent of the assignor for buying releases from the creditors for the assignor. (2 Edmonds' Statutes, 140, § 1; *Wilson v. Robertson*, 21 N. Y. 587; *Durham v. Whitehead*, id. 133; *Whitney v. Kelley*, 67 Me. 379; *Wyle v. Beals*, 1 Gray, 233, 239.) A trustee cannot deal in his own behalf in the trust funds or property. (*Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Ackerman v. Emmott*, 4 Barb. 626; *Chapin v. Weed*, Clarke, 464.) Nor as agent for a third person. (*Haroley v. Cramer*, 4 Cow. 717; *Gould v. Gould*, 35 Barb. 270; *Colburn v. Morton*, 1 Abb. Ct. App. Dec. 378; *Monroe v. Claire*, 2 Cai. 320; *Quacken-*

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- bush v. Leonard*, 9 Paige, 334; 3 Atk. 37; 3 P. Wms. 249; 1 Salk. 155; *Green v. Winter*, 1 Johns. Ch. 26; *Vanhorne v. Ford*, 5 id. 388.) *In re Marquand, Assignee Coffin and Lyon* (June Term, 1879), the power to compromise, vitiates the assignment because it authorizes the assignee to delay the distribution of the estate, in defiance of the court and for the benefit of the assignor. (*McCleery v. Allen*, 7 Neb. 21; *Nicholson v. Leavitt*, 2 Seld. 520; *Works v. Ellis*, 50 Barb. 512; *Boardman v. Halliday*, 10 Paige, 223; *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 Comstock, 365; *Benedict v. Huntington*, 32 N. Y. 223; *Dunham v. Waterman*, 17 id. 19; *Benedict v. Huntington*, 32 id. 225.) These provisions vitiate the assignment, because they authorize the assignee to pay the expense of making or attempting the compromise out of the estate. (*Sewell v. Russell*, 2 Paige, 176; *Mead v. Phillips*, 1 Sandf. Ch. 83; *Planck v. Schermerhorn*, 3 Barb. Ch. 514; *Nichols v. McEwan*, 17 N. Y. 22; *Mackie v. Cairns*, 5 Cow. 679.) The assignment is also void because of the provision authorizing the assignee, in collecting the notes and accounts, to take "a part for the whole when he shall deem it expedient." (*In re Sansom*, N. Y. Daily Register, June 13, 1878; *Hardman v. Bowen*, 39 N. Y. 196; *Itchfield v. White*, 7 id. 438; *Burrill on Assignments*, 14; *Hutchinson v. Lord*, 1 Wis. 386; *Bump on Fraudulent Conveyances*, 414; *Olmstead v. Herrick*, 1 E. D. Smith, 310; *Metcalf v. Van Brunt*, 37 Barb. 621; *Woodburn v. Mosher*, 9 id. 255; *Dow v. Platner*, 16 N. Y. 562.)

DANFORTH, J. Where, upon the face of an assignment or by proof *aliunde*, it appears to have been made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff who seeks to enforce by execution a judgment against the debtor. This rule was applied at the Circuit and the General Term, but with different result. The trial judge held the instrument valid upon its face, and the jury found that it was made in good faith and without intention to hinder or defraud the creditors of the assignor. The General Term so

construed its provisions as to imply an illegal purpose, and the correctness of this conclusion is the question here. It turns upon certain language in the habendum clause, where, after describing the property, the assignor declares the conveyance to be in trust; first, to sell and dispose of his personal property and estate, and "collect the notes, accounts and choses in action, *and the taking a part of the whole when the party of the second part*" (the assignee) "shall deem it expedient to so do"; and second, prescribes the distribution and payment of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or, if insufficient for that purpose, "in proportion to their respective demands," but further declares that the assignee "may have the right to compromise with," those creditors, if in his opinion "it would be advantageous" to them and to the assignor. Upon these provisions the contention hinges.

The first condition, taken literally, means only that the assignee may receive payment by installments or from time to time. He is to collect the notes, etc., but he may take a "part of the whole when he deems it expedient to do so." There is no direction to compromise, none to make abatement, none to give a discharge of the whole on receiving a part. It is not that a part may be taken *for* the whole, but of the whole. A debtor cannot insist on paying his debt by portions, nor is a creditor required to receive it in that manner. Nor is payment and acceptance of a part satisfaction of the debt. The clause in question confers authority to receive fractional payments, but none to give satisfaction. If there is doubt as to its meaning, it should be solved in such a manner as to uphold rather than destroy the instrument. It was construed at General Term, however, and by the respondent here as if it conferred upon the assignee power to compromise or compound debts due the assignor by accepting part for the whole. This is not expressed, but if such is the effect, it would be no stronger than the case made in *Coyne v. Weaver*,\* where to

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\* *Ante*, p. 886.

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similar words was added an express "right to compound for the said chose in action," and yet the assignment was upheld. Therefore the provision in question does not taint the assignment.

A different result follows from the clause, permitting the assignee to compromise with the creditors of the assignor. To that must be applied the rule declared in *Grover v. Wakeman* (4 Paige, 23; 11 Wend. 187), and adopted in many later cases, either in words or effect, as the only safe one, and which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds and therefore void. But within that limitation a failing debtor may, however, uselessly amplify the words which transfer his estate and appropriate it to the payment of his debts; for although he may thus excite suspicion and provoke litigation, and so bring his deed to judgment, they will not, unless inconsistent with the rights of creditors, invalidate his act. And first, it is in favor of this instrument that it provides for a surrender of all the debtor's property and its equal division. Such is the desire of the assignor, as expressed in words: "To convey all his property for the benefit of all his creditors, without any preference or priority." These are the premises. The declaration of trust, or direction for distribution of the proceeds of this property, is in furtherance of this desire. It goes to all creditors, for all debts; and if not enough to pay in full, then *pro rata*. These are valid provisions, and if the assignor had gone no further, the object of the trust would have been carried out as one to the advantage of the beneficiaries. The debtor would have given up all that he had, to be applied without reserve to the payment of his debts. But then comes the succeeding clause, and this we cannot help seeing is a provision which at once nullifies all that has been commended. Without this it is such an instrument as is favorably regarded by a court of equity. With it the assignment comes within the principle of many cases where trusts have been "subverted as illegal," because the assignee was invested with some absolute or discretionary



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power beyond the direct appropriation of the assets to the payment of debts ; or the assignor reserved to himself a power over the future direction of the trust fund, or an interest in it, to be taken care of for him by the assignee. If the assignment is valid, the trust to compromise is to be observed and regarded by the courts, and delay for that purpose in the disposition of the property or the distribution of the avails could be justified by the assignee, although required by a creditor to hasten the conversion of assets or pay over its avails. So too in negotiation for or arranging a compromise, the interest of the debtor is to be regarded and kept in view by the assignee, for it is permitted only when in his opinion such proceeding would be advantageous to the assignor. It therefore cannot be said that the assignor has devoted his property absolutely and unconditionally to the payment of his debts. If under the preceding clauses a creditor should insist that the assignor had so directed, the assignee could say there is also given an express power to compromise, *i. e.*, procure concessions from creditors, before parting with the property. If all the creditors should say, we will compromise ; give us the whole property, and we will discharge the debts, the assignee could say, that would not be advantageous to the assignor, and in either case could uphold his conduct by the very words of the instrument. But suppose the assignment did not contain this clause. The assignee could neither delay the execution of the assignment by an effort to compromise, nor consider the interest of the assignor in determining the time or manner of the execution of his trust. As it is, while placing his property beyond the reach of process, the assignor retains an interest to be provided for, delays its application to the payment of his debts by investing his trustee with power which requires time for its execution, and then prohibits its exercise, unless it is advantageous to himself. I am inclined to construe this clause as requiring a compromise if at all, with all the creditors, not permitting it with any one, or any number less than all ; but this does not meet the difficulty. There is the power to compromise ; and this

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must be construed in the sense of compound, or to discharge the debts by paying only a part; its accomplishment requires the consent of the creditors and the assignee; a payment of part by the assignee and a discharge upon its acceptance by the creditors. The imposition, then, of terms and conditions, and in devising these the interest or advantage of the debtor must be considered. This is a plain departure from the power to convert and the duty to pay over the proceeds of the property when converted, without regard to the debtor, and with no inquiry save as to the existence of the debt and its amount. It is said that this compromise cannot be made unless each creditor consents; neither can it unless the assignee consents for the assignor, that is, deems it for his advantage also. But without this there may be delay justified; an effort to make a compromise would require it; and until it had been tried, if the assignee saw fit to make the effort, the court could not require him to act under the other trusts. The legal duty of the assignee under a valid trust is as plain and simple as that of an officer holding an attachment or charged with the duty of enforcing judgment by execution. However great the apparent sacrifice, and however disadvantageous to the debtor, the law permits no wish or interest of his to come between the creditor and the satisfaction of his debt, and it requires from the appointee of the debtor equal celerity and the same indifference. Here compromise, or an attempt at compromise, may precede payment, and with either is delay. It seems evident, therefore, that the intent was to delay the payment of the debts and create a trust for the use of the assignor; and either of these intents, both by the common law and the statute (2 R. S. 135, § 1; id. 137, § 1), is a fraud, in face of which the assignment cannot stand.

The cases cited by the appellant's counsel, and referred to in his interesting and impressive argument, raise no doubt as to the necessity of this conclusion. *Jewett v. Woodward* (1 Edw. Ch. 195) was most insisted upon. But there the question did not arise. The assignment was not attacked, but acquiesced in, and the bill was filed against the assignees for an account

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and payment of the money to which the creditors were entitled under it. *Hone v. Henriquez* (13 Wend. 240), where it was held that one who had become a party to the assignment by a formal assent thereto could not be heard to say that it was void; and so doubtless an assignment, however objectionable, if executed by consent of all the creditors, would be deemed valid and not void. But neither these cases, nor the reasons on which they stand, aid the plaintiff. The creditors did not consent, and one objection to the assignment is that under its provisions the assignee could delay the execution of the other trusts until he ascertained whether they would compromise. Power to compromise restrains the creditors until the attempt is made. Thus they would be hindered, and a delay in the conversion of property or the payment of debts, even for a single day, would be fatal to the assignment; and whether the delay is directed by the instrument, or justified by its provisions, or made necessary for their execution — except so far as that delay is incident to the conversion of assets and payment of debts can make no difference. (*Nicholson v. Leavitt*, 6 N. Y. 510; *Bingham v. Tillinghast*, 13 id. 215.) This illegal delay is provided for by the clause in question.

It is also urged by the appellant that the jury found by their verdict "that the assignment was not made by the assignor with the intent or for the purpose of coercing creditors into compromising the debts he owed them." This is so. But it was after the court had held the clause in question did not vitiate the assignment, and under a charge that it was not evidence of an attempt on the part of the assignor to coerce them. It was withdrawn from their consideration.

We think the learned trial judge erred in his construction of this clause of the assignment, and that the judgment given upon the verdict was properly reversed by the General Term. The order of that court should therefore be affirmed and judgment absolute rendered for the defendant, according to the stipulation upon which this appeal was taken.

All concur, except RAPALLO, J., absent.

Order affirmed, and judgment accordingly.

## Statement of case.

JOHN S. CAGWIN, Respondent, v. THE TOWN OF HANCOCK,  
Appellant.

The jurisdiction of *quasi* judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction.

There can be no *bona fide* holder of town bonds within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute. All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith, does not preclude the town from showing that they were illegally issued.

The decisions of the Federal courts holding a contrary doctrine held not to be controlling.

Under the provisions of the act of 1866 (§ 2, chap. 398, Laws of 1866) authorizing certain towns to subscribe for the stock of the N. Y. & O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, "shall be proved by affidavit, in writing," of one of certain specified town officers, and declaring that such affidavit "or a certified copy thereof shall be evidence of the facts therein contained," the affidavit is not conclusive but only *prima facie* evidence of the facts and may be disputed.

Accordingly *held*, in an action to recover the amount due upon certain interest coupons cut from bonds issued by railroad commissioners appointed for defendant under said act, and which had been purchased for value and in good faith, that defendant was not precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the tax payers of the town had not been obtained.

*People v. Mitchell* (35 N. Y. 551), *Bank of Rome v. Village of Rome* (19 id. 20), distinguished.

*Cagwin v. Town of Hancock* (23 Hun, 201), reversed.

(Argued March 7, 1881; decided March 15, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 24,

## Statement of case.

1880, reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 22 Hun, 201.)

The nature of the action and the material facts appear in the opinion.

*Wm. Gleason* for appellant. The towns of this State have no power to bond for railroads unless it has been expressly conferred by statute. (*Town of South Ottawa v. Perkins*, 4 Otto, 258, 266; id. 429; 13 Wall. 304; 3 id. 327; *Wiesmer v. The Village of Douglas*, 64 N. Y. 92; *Starin v. The Town of Genoa*, 23 N. Y. 439; *Gould v. The Town of Sterling*, 23 N. Y. 440, 462; *People v. Mitchell*, 35 id. 551; *Donnelly v. The Town of Ossining*, 18 Hun, 352; 1 R. S. 337, § 2.) Where there has been no authority to issue bonds, they can never have any legal inception, and there can be no *bona fide* holder of them in whose hands they can be valid. (*Town of Venice v. Woodruff*, 62 N. Y. 465; *The Township of Oakland v. Skinner*, 4 Otto, 255; *Town of South Ottawa v. Perkins*, id. 258, 260; id. 269; *Horton v. Town of Thompson*, 71 N. Y. 513, 521; *Weismer v. Village of Douglas*, 64 id. 92; *Starin v. Town of Genoa*, 23 id. 439, 456; *People v. Mead*, 24 id. 114; *S. C.*, 36 id. 224; *People v. Smith*, 45 id. 773; *People v. Knowles*, 47 id. 415, 419; *People v. Spencer*, 55 id. 1; *Town of Venice v. Woodruff*, 62 id. 465; *Town of Springport v. Bank*, 75 id. 397; *Buchanan v. City of Litchfield*, U. S. Court, Nov. 22, 1880; 22 Alb. L. J. 516; *Dodge v. County of Platte*, 82 N. Y. 218; 76 id. 185; 78 id. 362-367; 79 id. 171; *Falconer v. The Buffalo & Jamestown R. R. Co.*, 69 id. 491, 497; 45 id. 772; 46 id. 110; 71 id. 309; 55 id. 1; *Angel v. Town of Hume*, 17 Hun, 374-384.) The affidavit of the assessors in no wise estopped the town from showing that the requisite consents were not given by a majority of the tax payers, nor for a major part of the property on the roll. (*Scipio v. Wright*, 11 Otto, 665, 667, 675; 75 N. Y. 406; 23 id. 464.) Neither the affidavit of an assessor, or town or county clerk is a judgment, nor is the issuing of the bonds a judgment binding the town. (4 N. Y. 515, 518, 522; *People v. Batcheller*, 53 id. 128; *Stewart v.*

## Statement of case.

*Palmer*, 74 id. 183-188, 189, 190, 191-196.) Purchasers of the bonds were chargeable with notice of the statute under which they were issued, and were bound to see to it that its provisions were complied with. (*Peck v. Burr*, 10 N. Y. 299; *Stafford v. Williams*, 12 Barr, 240-243; *Donovan v. The Mayor, etc., of N. Y.*, 33 N. Y. 291, 292; *McDonald v. Mayor, etc.*, 68 id. 23; 2 Den. 110; 33 N. Y. 293; 1 Den. 510; 8 Allen, 109.) Where any court or officer has acted without jurisdiction the acts are void, and no appeal or *certiorari* is necessary to get rid of them, but whoever acts thereunder is a trespasser. (*Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Mygatt v. Washburn*, 15 id. 316; *Whitney v. Thomas*, 23 id. 281; *Cruger v. Dougherty*, 43 id. 107, 121; *Overing v. Foote*, 65 id. 263; *Hallock v. Rumsey*, 29 S. C. 89-91; *People v. Van Slyck*, 4 Cow. 297, 316; *People v. Cook*, 8 N. Y. 67.)

W. J. Welsh for respondent. The consents in writing filed and recorded have been made, by statute, the record evidence upon which officers were authorized to act, and cannot be impeached by parol evidence in a collateral proceeding. (*Pierce v. Wright*, 45 How. 6; 2 Stark. 544 [5th Am. ed.]; *People v. Zest*, 23 N. Y. 140; *Pierce v. Wright*, 45 How. 6.) The defendant is concluded by the affidavit of the assessors, and cannot in this action question the sufficiency of the consents to bond. (*Bank of Rome v. The Village of Rome*, 19 N. Y. 24; *Com'rs of Knox County v. Aspinwall*, 21 How. [U.S.] 546; *Shell v. Telfore*, 4 N. Y. Legal Observer, 307; *Com'rs of Douglas County v. Boles*, 4 Otto, 109; *Howland v. Eldridge*, 43 N. Y. 460; 1 Whart. on Ev. [2d ed.], § 1; *Pierce v. Wright*, 45 How. 7; *People v. Mitchell*, 35 N. Y. 552; *Bk of Rome v. The Village of Rome*, 19 id. 22; *Town of Colma v. Eaves*, 2 Otto, 484, 487; *Thompson v. Lee County*, 3 Wall. 327; *Town of Venice v. Murdock*, 2 Otto, 498; 4 id. 205; *Block v. Commissioners*, 9 id. 686; *People ex rel. Town of Rochester v. Deyoe*, 2 N. Y. S. C. [T. & C.] 146.)

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Opinion of the Court, per EARL, J.

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EARL, J. This action was brought to recover the amount due upon certain interest coupons, which had been cut from bonds issued by the railroad commissioners appointed for the defendant under the act chapter 398 of the Laws of 1866, entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof," and the several acts amendatory thereof. Claiming authority under the acts referred to, the railroad commissioners in 1871 subscribed for \$100,000 of the stock of the New York and Oswego Midland Railroad Company, and in the years 1871 and 1872 issued bonds of the defendant to pay for such stock. The bonds were delivered by them, upon the orders of the railroad company, to one Culver, who was a contractor engaged in building the railroad, and who had no knowledge when he received the bonds that the defendant made any question as to their validity or legality. He afterward sold all the bonds to divers persons. William Gilman purchased some of them in good faith and for full value, and he cut off the coupons and sold them to the plaintiff for their full value. The defendant defended this action upon the ground mainly that a majority of the tax payers of the town, owning or representing more than one-half of the taxable property, did not consent in writing to the bonding of the town as required by the acts. The referee sustained this defense. But upon appeal by the plaintiff to the General Term, his decision was reversed, and it was there held that the affidavit of the assessor, stating that the requisite number of tax payers had consented to bonding the town, was, in favor of the plaintiff, a *bona fide* holder of the coupons, conclusive upon the town, and precluded proof that they had not in fact consented.

The referee found, as a matter of fact, that the requisite number of tax payers had not consented to bonding the town; and as his finding was not disturbed by the General Term, it is not now disputed that it concludes us. The main inquiry here, then, is as to the conclusive nature of the affidavit of the assessors; and that inquiry involves an examination of the acts of the legislature relating to the subject.

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Opinion of the Court, per EARL, J.

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Section 1 of the act of 1866 provides that upon the application of twelve or more freeholders of any town, the county judge or the Supreme Court may appoint the railroad commissioners. Section 2 provides that it shall be lawful for the commissioners to borrow on the credit of the town such sum of money as the tax-paying inhabitants shall fix upon by their assent in writing, not exceeding in amount thirty per cent of the assessed valuation of the real and personal property of the town, as shown by the assessment roll, and to execute bonds for the sum so borrowed, providing, however, that the consent shall first be obtained in writing of a majority of the tax payers of such town, owning or representing more than one-half of the taxable property of the town assessed and appearing upon the assessment-roll, which consent shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged. It is further provided that the fact that a majority of the tax payers representing a majority of the taxable property has been obtained and acknowledged, "shall be proved by the affidavit in writing" of one of the assessors of the town, or of the town clerk, or county clerk, which shall be indorsed upon or annexed to the written consent, and the consent and affidavit shall be filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county; and that "the same, or a certified copy thereof, shall be evidence of the facts therein contained, and shall be admitted in evidence in any court in this State and before any judge or justice thereof; and it shall be the duty of the said assessors and town and county clerks to make such affidavit when said consent shall have been obtained as provided in this section."

It will thus be seen that the commissioners had no power to issue any bonds until the requisite consent of the tax payers had been obtained. That was made a fundamental condition of their action, and it was the manifest intention of the legislature that the bonds should not be issued without such consent.

After the consents had been obtained the section imposed a duty upon the assessors, town clerk and county clerk. That duty did not arise until the requisite number of consents had



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been obtained. They had no right to act and could not be compelled to act before. They were required to make the affidavit, in the language of the act, "when the said consent shall have been obtained as provided in this section." There was nothing in the act expressly imposing upon them the duty of inquiring to ascertain whether the requisite consents had been obtained, or to make an adjudication upon that subject; but such a duty may be implied. They had no right to call and examine witnesses, and there was nothing really resembling a judicial inquiry to be made by them. They were to take the consents and compare the names on them with the names on the assessment-roll of the town, and thus, with perhaps such other information as they could obtain, determine whether the requisite number of tax payers had consented. They were to swear no witnesses, conduct no judicial inquiry under the sanction of oaths, and render no formal judgment. If they believed the requisite number of the tax payers had consented, they were to make the affidavit. They had no greater facilities for reaching the truth in the matter than any other citizens. It cannot be supposed that the legislature intended that a single assessor, without hearing any parties, without the aid of sworn witnesses, and usually without legal skill or knowledge, should conclusively determine the puzzling questions of facts, and the difficult and perplexing questions of law, which frequently attend upon an inquiry as to whether the requisite consents of tax payers have been obtained, and that he should thus, by his simple *ex parte* affidavit, conclusively bind the town to the limit of thirty per cent of all the taxable property therein. If it had been intended to give such dangerous and extraordinary force to such an affidavit, we may suppose that the intention would have been plainly expressed in the statute, and that it would not have been left to inference. A contrary intention is evinced in the explicit and emphatic manner in which the requirement of the consent of the majority is placed in the acts. In the act, chapter 61 of the Laws of 1868, entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to amend the several acts in relation

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thereto," this intention is plainly manifested. In section 1 it is provided, that in every case where consents in writing shall have been obtained of the "majority of the tax payers appearing upon the assessment-roll of any town for the years 1865 or 1866 to the borrowing of money on the faith and credit of the town, etc., and when such tax payers shall own or represent more than one-half of the taxable property, such consents shall be valid and effectual and shall not be invalidated" for certain defects or irregularities stated, provided a majority of the tax payers owning or representing a majority of the taxable property have consented. Section 2 again provides that no consent of tax payers, nor the bonds issued or to be issued upon the faith of such consent, shall be invalidated or held invalid on account of certain defects or irregularities, provided that the consent of the requisite majority has been obtained. Thus the legislature makes it emphatic that the fundamental prerequisite, on all occasions and for all purposes, must be the majority consent.

If the legislature had intended that there should be a conclusive determination that the requisite consents had been obtained before the bonds could be issued, it would have provided a tribunal, consisting of the commissioners, or the county judge, or possibly the assessors, which was to take proofs, hear parties, conduct a judicial inquiry and make a judicial determination.

If the law had simply required the assessors, town clerk or county clerk to make and file an affidavit that a majority of the tax payers owning a majority of the taxable property had consented, and had stopped there, the affidavit would not have been any evidence of the facts stated in it, and a person suing upon one of the bonds would have been obliged to prove affirmatively that the requisite consents had been obtained (*Starin v. Town of Genoa*, 23 N. Y. 439; *People v. Mead*, 36 id. 224; *Town of Venice v. Woodruff*, 62 id. 463); and yet the affidavit in that case would have been just as much a judicial determination as the one we are considering. Such an affidavit is, therefore, evidence only so far as the law makes it evidence,

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and all it says is, that "it shall be evidence of the facts therein contained." This language is satisfied without holding that it shall be conclusive evidence. It is satisfied by holding that it is competent or *prima facie* evidence. By giving the language a more extended meaning the affidavit would have more force, we think, than was intended by the legislature. Where it was intended in similar acts that the affidavit, or the preliminary inquiry as to the number of consents, should be conclusive, it has been so expressly provided (Laws of 1863, chap. 19, and of 1864, chap. 402), or provision has been made for a formal hearing, for proofs and a judicial determination. (Laws of 1869, chap. 907, §§ 2, 9.) Where it is intended in a statute to make an affidavit or any writing conclusive evidence, there is usually something in the statute clearly to indicate such intention. (1 R. S. 173, § 22; id. 412, § 81; 2 R. S. 377, § 2; Code, § 1933. See also the statutes and authorities cited by Judge ALLEN in *People ex rel. Martin v. Brown*, 55 N. Y. 196.) In the case of *People ex rel. Martin v. Brown*, that learned judge, in an able discussion of the subject, holds that this affidavit is not conclusive evidence, but only competent or *prima facie* evidence of the facts stated in it. To give this affidavit the effect claimed for it, we would have to go against the spirit of many decisions in this court. The bonding acts are now regarded as hostile to a sound public policy. As said by Judge ANDREWS in *Town of Wellsboro v. N. Y. & C. R. R. Co.* (76 N. Y. 185), they "are subversive of the just rights of the minority, who do not consent to the issue of the bonds," and we have never been disposed to uphold bonds issued under these acts, except upon a strict and exact compliance with the act which authorized their issue. To hold that the *ex parte* affidavit of one assessor would be sufficient in its effect to bond a town when the facts authorizing it to be bonded did not actually exist, would be giving a construction to the language and purposes of this act altogether too liberal. In *The People v. Mitchell* (35 N. Y. 551), the affidavit that the requisite consent had been given was made conclusive by the statute. In *Town of Springport v. The*

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*Teutonia Sav. Bank* (75 N. Y. 397), the statute made the affidavit presumptive evidence; and hence those cases have very little bearing upon this case, although the principle to be deduced from them is favorable to the conclusion we reach. In *Bank of Rome v. Village of Rome* (19 N. Y. 20), the village was authorized to subscribe for the stock of a railroad company, provided that two-thirds of the tax-paying electors of the village should first approve the subscription, and the village was authorized to issue bonds to raise money to pay for such subscription, and railroad commissioners were named in the act. There was no dispute that the subscription had been approved by the tax payers. But it was provided in section 11 of the act (chap. 283, Laws of 1853), that the commissioners should have no power or authority to negotiate, sell or transfer the bonds, or create any liability whatever, except upon the express condition that \$500,000 should first have been subscribed to the stock by other parties; and the commissioners, before negotiating or transferring any of the bonds, should make and subscribe a certificate in writing that such subscription of \$500,000 had been actually made, and that in their judgment and belief the same had been made in good faith and by persons of ability sufficient to pay their several subscriptions. It was held that the certificate thus made was conclusive evidence in favor of *bona fide* holders of bonds that the requisite subscriptions had been made. That case is claimed as an authority for the plaintiff's contention in this case. But while the distinction between the two cases is not very broad, yet there is a distinction which deprives that case of its character as a controlling authority in this. There the subscription to the stock had been regularly authorized. There was nothing more for the village or its tax payers to do. Whatever else remained was committed to the railroad commissioners named in the act, as agents of the village. They were to determine whether the other subscriptions had been made, and if they found they had been, they were to issue the bonds, acting as agents of the village. The difficulty in this case is that the fundamental fact, the majority consent, is wanting. The town was to act through a majority of its tax

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Opinion of the Court, per EARL, J.

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payers, and such action it never took. Until such action was taken no officer or agent could bind it by bonds issued or stock taken under the act.

It is true that the assessors, in determining whether the requisite consents had been given and in making the affidavit, exercised *quasi* judicial functions. (*Howland v. Eldredge*, 43 N. Y. 457; *People ex rel. Yawger v. Allen*, 52 id. 538.) And that their determination embraced in their affidavit is in the nature of a judgment. But regarding the affidavit as a judgment, it was a judgment which they could render only if they had jurisdiction. By the express terms of the statute they were not to make the affidavit until the requisite consents were obtained. Until that time they had no jurisdiction to act. They could not obtain jurisdiction by determining that they had it. Whether *quasi* judicial officers and courts of limited special and inferior jurisdiction have jurisdiction to make a decision in any case is always open to inquiry, and their decision in any case can be attacked collaterally for want of jurisdiction. It is made the duty of town assessors to ascertain all the property and persons in their town liable to taxation, and in making the determination and assessing the property, their action is of a judicial character; and yet they cannot obtain jurisdiction over property or persons by determining that they have it. They must first have jurisdiction before they can lawfully act. (*Nat. Bank of Chemung v. City of Elmira*, 53 N. Y. 49.) So here, the assessors had no jurisdiction to make the affidavit and render their *quasi* judgment until the requisite consents had been obtained; and if the consents had not, in fact, been obtained, their determination that it had been could not give them unimpeachable jurisdiction.

The legislature was undoubtedly competent to declare what effect this affidavit as a *quasi* judgment should have, and it has said that it shall be evidence of the facts therein stated. It furnished *prima facie* evidence which it would generally be safe for all persons to rely on. In a suit upon the bonds it placed the burden upon the town defending against the bonds,

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to show that the affidavit was made without jurisdiction, in that the requisite majority of the tax payers had not actually consented. So that the affidavit served a very useful purpose, although not having the effect of a conclusive judgment binding upon all persons.

But the claim is made that the affidavit ought to be conclusive in favor of *bona fide* holders of the bonds. But there can be no *bona fide* holders of bonds, within the meaning of the law applicable to negotiable paper, which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by virtue of special authority conferred by some statute. Unless issued in the way pointed out by statute, they cannot bind the town. The statute specifies the powers of the agents of the town and the precise conditions upon which the bonds could be issued, and all persons taking the bonds are chargeable with knowledge of the statute, and they must see to it that the statute has been complied with before they can with absolute safety take the bonds. Such is the law as laid down in this State. (*Town of Venice v. Woodruff*; *Starin v. Town of Genoa*; *People v. Mead*, *supra*.) There are undoubtedly decisions of the Federal courts holding in favor of *bona fide* holders of such bonds a different doctrine; but those decisions have not been regarded as controlling authority in this court.

There are no facts in this case upon which it can be held that the town can be estopped from asserting the invalidity of the bonds. As a town, there is no act or omission chargeable to it upon which an estoppel can be based.

It follows, therefore, that the order of the General Term should be reversed and that the judgment upon the report of the referee should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Order reversed and judgment accordingly.

## Statement of case.

QUINCY W. WELLINGTON, Respondent, v. MARY J. KELLY et al., Executors, etc., et al., Appellants.

H. claimed title to a mortgage executed by B. to F. under a trust deed executed by the latter. F. brought suit against H. to set aside the trust deed, in which action a receiver was appointed of the trust property with authority to collect and satisfy the mortgage. While the order appointing the receiver was in force, one J. F. H., without authority from or request by B., paid to the receiver the amount of said mortgage, receiving the mortgage and a satisfaction-piece thereof, and the receiver paid over the amount to F. H. thereafter commenced an action to foreclose the mortgage, making B., the mortgagor, and T., who held a junior mortgage on the premises, defendants. B. answered, alleging payment and satisfaction of the mortgage. B. and T., thereupon, entered into a contract with J. F. H., by which the latter agreed to furnish the papers and evidence to sustain the defense; in consideration thereof, and if the defense should be successful, B. and T. agreed to pay one-half the amount of the mortgage. J. F. H. performed the contract on his part and the action of H. was defeated. In an action upon the contract, *held*, that plaintiff was entitled to recover, that no corrupt intention appeared upon the face of the contract, and under the circumstances disclosed, there was no ground for supposing that it was entered into for the purpose of perverting justice by procuring false testimony in support of the defense in the foreclosure suit.

As to whether payment of a debt by a stranger is a satisfaction, *quære*.

(Argued March 2, 1881; decided March 22, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 6, 1880, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was brought upon a contract dated January 26, 1874, made between Joseph F. Hill, plaintiff's assignor, and Morris Brown and Nelson Thompson, the original defendants herein. Brown having died during the pendency of the action, his executors were substituted as defendants in his stead.

The facts are sufficiently set forth in the opinion.

*W. F. Cogswell* for appellants. The contract sued upon was illegal and void as against public policy. (*Pingey v.*

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*Washburne*, 1 Aikens [Vt.], 264; *Fuller v. Dame*, 18 Pick. 472; *Gray v. Hook*, 4 Comst. 449; Story on Contracts, 576.)

*Geo. B. Bradley* for respondent. The contract in suit was valid and not contrary to sound morality or against public policy. (*Doty v. Wilson*, 14 Johns. 378; *Sternbergh v. Provost*, 13 Barb. 365; *Nicholson v. Wilson*, 60 N. Y. 362.) The contract, in view of the circumstances, is fairly entitled to and should have that construction which will give to it a legitimate purpose and effectuate the intention of the parties to it. (*Parshall v. Eggert*, 54 N. Y. 18; *Findon v. Parker*, 11 M. & W. 684; *Pollock v. Gregory*, 9 Bosw. 116; *Nicholson v. Wilson*, 60 N. Y. 370; 35 Vern. 69; *Stanley v. Jones*, 7 Bing. 369; *S. C.*, 5 M. & P. 195.) The objection that plaintiff was a stranger and all objections of that character founded upon the old rule of champerty and maintenance, whether by statute or common law, have been removed by the Revised Statutes. (3 R. S. [2d ed.] 151, reviser's note, p. 828; *Sedgwick v. Stanton*, 14 N. Y. 289, 295, 299, 301; *Durgin v. Ireland*, id. 322, 328; *Voorhees v. Dorr*, 51 Barb. 580.) The doctrine of champerty and maintenance never denounced as illegal an agreement to aid by furnishing evidence or in any other legitimate manner the prosecution or defense of an action where the party making the agreement to do so had any interest, certain, contingent or supposed, in the question or subject involved, directly or remotely other than such as was derived from the agreement itself. (*Thallheimer v. Brinckerhoff*, 3 Cow. 623; *S. C.*, 20 Johns. 386; *Fendon v. Parker*, Mees. & Wels. 675, 682-3; *Williams v. Protheroe*, 3 Y. & J. 129; *S. C.*, 2 M. P. 779; 5 Bing. 309; *Gilliland v. Failing*, 5 Den. 312; *Vrooman v. Shepard*, 14 Barb. 449; *Campbell v. Jones*, 4 Wend. 310; Bac. Abr., Maintenance, "B;" *Sales v. Tibbitts*, 5 R. I. 79.) It was sufficient to protect plaintiff's agreement that he was justified in the belief and believed he had an interest. (*Thallheimer v. Brinckerhoff*, 3 Cow. 647; *Findon v. Parker*, 11 M. & W. 775; *Dorwin v. Smith*, 35 Vt. 69, 74; *McCall v. Capehart*, 20 Ala. 521, 526.) It was no objection that he



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was to share in the fruits of the litigation dependent upon the result. (5 Den. 312; 3 Cow. 625; 14 N. Y. 289; *Danforth v. Streeter*, 28 Vern. 495; *Thallheimer v. Brinckerhoff*, 3 Cow. 647-8; *Findon v. Parker*, 11 M. & W. 682; 28 Vern. 495; 35 id. 74.)

ANDREWS, J. The agreement of January 26, 1874, between Joseph F. Hill, and the original defendants, recites the execution of a mortgage by Brown to Joseph Fellows, which John Heermans as trustee was seeking to foreclose and collect, and that one Hiram W. Bostwick, a receiver appointed by the Supreme Court, had theretofore as receiver satisfied and discharged the mortgage and delivered it together with the satisfaction-piece to Hill, upon payment of the amount due. This recital is followed by the agreement of the respective parties. Hill, on his part, agrees to furnish to Brown the papers and evidence necessary to defeat Heermans in the foreclosure action, and Brown and Thompson, on their part, in consideration that Hill shall furnish such papers and evidence, and that thereby such action shall be defeated and a recovery on the mortgage finally prevented, agree to pay Hill one-half of the amount of the mortgage. This action is brought by the assignee of Hill against Brown and Thompson upon this agreement. It is found that Hill performed the agreement on his part and furnished the papers and evidence to defeat Heermans in the foreclosure action, and that judgment was rendered therein in favor of the defendants.

It is insisted that the agreement upon which the action is brought is illegal and void as against public policy, for the reason that it tended to pervert justice, by holding out an inducement to Hill for the fabrication of false papers and the furnishing of false evidence in the action brought by Heermans. This is the only question in the case. It is essential to its proper determination to understand the circumstances under which the agreement was made.

The mortgage sought to be foreclosed by Heermans was executed by the defendant Brown to Joseph Fellows. Heermans

claimed title to the mortgage under a trust deed executed to him by Fellows in October, 1868. Thereafter an action was brought by Fellows against Heermans to set aside and annul the deed of trust. In that action Hiram W. Bostwick was appointed receiver of the property covered by the trust, with authority to collect the debts and mortgages transferred by the trust deed, and to acknowledge satisfaction of mortgages on receiving payment, and to pay over the proceeds of collections to Fellows. The receiver duly qualified and took possession of the property transferred by the trust deed, including the Brown mortgage. After this and on the 20th of February, 1870, and while the order appointing the receiver was in full force, Hill paid to the receiver (although without any authority from Brown, or any request by him) the full amount of the mortgage, and the receiver thereupon executed and acknowledged a satisfaction-piece of the mortgage and delivered it with the mortgage to Hill. The receiver, prior to March 1, 1871, paid over to Fellows the amount so paid by Hill, and took his receipt, and entered the fact of the payment by Hill, and the payment over to Fellows, in his report filed on that day. Heermans, after this payment, claiming title as trustee, and that the mortgage was unpaid, commenced the foreclosure action mentioned in the agreement, making Brown, the mortgagor, and Thompson who held a junior mortgage on the same premises covered by the Brown mortgage, defendants. On the 20th of April, 1873, Brown put in a verified answer in the action, alleging that the mortgage had been paid to Bostwick, the receiver, and that he had satisfied and discharged it. On the trial of the action in 1875, Hill furnished to Brown certified copies of the records in the action of *Fellows v. Heermans*, and of the order appointing Bostwick receiver, etc., and produced the mortgage and the satisfaction thereof by the receiver, and procured the attendance of the receiver as a witness to prove the fact of payment. Upon the records so furnished by Hill, the mortgage and satisfaction, and the proof of payment

by Bostwick, the issue of payment was found in favor of Brown and the action was defeated.

In considering the question of the validity of the contract, it is to be observed that no corrupt intention appears upon its face; and, construing it in view of the situation of the parties and of what was done under it, there is no ground for supposing that it was entered into for the purpose of perverting justice by the production of false testimony in support of the defense in the foreclosure action. The relation of Hill and Brown to the mortgage was peculiar. Hill having paid the mortgage voluntarily, without the authority or request of Brown, could not have maintained an action against the latter to recover the money paid, in the absence of a subsequent promise by Brown, or such an adoption by him of Hill's act as was equivalent to an original authority. But if the payment was in law a satisfaction of Brown's debt, there was a moral obligation on the part of Brown to reimburse Hill. If the payment by Hill did not operate as a legal satisfaction of the mortgage, then Brown was under neither a legal nor moral obligation to indemnify him. Whether the payment by Hill was a legal discharge of the mortgage depended first upon the legal authority of the receiver to receive payment, and next upon the authority of the rule declared in *Grymes v. Blofield* (Cro. Eliz. 541), that payment of a debt by a stranger is not a satisfaction. That case has been much criticized and materially limited by subsequent cases in England and elsewhere. (*Jones v. Broadhurst*, 9 M. & Scott, 173; *Simpson v. Eggington*, 10 Exch. 845; *Leavitt v. Morrow*, 6 Ohio, 71.) But it was followed in this State in *Clow v. Borst* (6 Johns. 36), and has not been authoritatively overruled; and we need not now determine whether it should any longer be regarded as authority. Assuming that the payment by Hill was not a discharge of the debt, and that the holder of the mortgage could, notwithstanding such payment, enforce it against the mortgagor, another question was presented, viz., whether the payment by Hill, and the delivery to him of the security concurrently with the payment,

did not operate as an assignment to him by the receiver of the mortgage. If the payment discharged the mortgage, another question arose, viz., whether Brown, by the plea of payment in the foreclosure action, which plea was interposed before the agreement now in question was made, had thereby adopted the act of Hill, so as to make him liable to Hill to the same extent as if he had originally authorized it. (*Belsharo v. Bush*, 11 C. B. 191; *Simpson v. Eggington*, *supra*.) It will be seen that the respective rights and obligations of Hill and Brown, growing out of the payment by Hill, and the subsequent transactions, were not free from doubt; and under the circumstances mentioned the agreement in question was made. The defense in the foreclosure action depended upon the legal force and effect of facts, the evidence of which in the main was documentary. As between Brown and Hill, it was equitable that, if Brown was able to avail himself of the act of Hill as a payment of the mortgage, he should indemnify Hill for his advances; and we perceive no objection to the recovery in this case, unless the rule is that every agreement made by a third person to furnish evidence in a litigation for a compensation contingent upon the event is illegal. I find no authority for so extensive a proposition. In *Stanley v. Jones* (7 Bing. 369), it was held that an agreement made by a third person to communicate to a person claiming to have been defrauded such information as should enable him to recover damages for the fraud, and to exert his influence to procure evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. In that case the person making the agreement to communicate the information, was an entire stranger in interest to the proposed litigation, and professed to have knowledge of facts of importance to the party, but which he did not disclose. Lord DENMAN said that such an agreement was illegal, from its manifest tendency to pervert justice, and we fully assent to the decision in that case. An agreement by a stranger to furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous

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in its tendency, as furnishing an inducement for perjury and the subornation of witnesses. But in this case Hill was not a stranger in interest to the subject of the litigation. His antecedent relation to the mortgage made it just that he should be indemnified, for the money advanced by him, in case his payment should be available to Brown in the foreclosure action. The mere fact that the agreement might furnish a temptation to Hill to prevaricate, or furnish false testimony does not, we think, stamp the agreement as illegal *per se*, and no illegal or improper intent on the part of any of the parties, is disclosed by the evidence.

We think that the judgment is right and that it should be affirmed.

All concur, except FOLGER, Ch. J., not voting, and RAPALLO, J., absent.

Judgment affirmed.

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RICHARD L. HUNTER et al., Executors, etc., Respondents, v.  
ISAAC D. WETSELL, et al., Appellants.

Where, after the making of an oral contract for the sale of goods void under the statute of frauds, a payment is made thereon, and at the time of such payment, the essential terms of the contract are restated, this takes the case out of the operation of the statute and validates the contract.

*Hunter v. Wetsell* (57 N. Y. 875), distinguished.

Where a check is delivered and received as a payment, which is good when drawn and is paid on presentation, this is a payment "at the time" within the meaning of said statute (3 R. S. 186, § 3, sub. 3), and satisfies its requirements.

Where, under a contract of sale of personal property, the place of delivery was to be designated by the vendee, *held*, that a tender was not required on the part of the vendor before action to recover the purchase-price, that readiness and an offer to deliver were sufficient.

The measure of damages in such an action is the contract-price less payments made thereon.

The vendor may, but is not bound to sell the property at auction after due notice and on account of the vendee; he may abandon the property, treat it as the vendee's and sue the latter for the contract-price.

That the property was perishable does not affect the question.

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In an action to recover the alleged purchase-price of a quantity of hops, wherein the statute of frauds was set up as a defense, plaintiff's evidence was to the effect, that after an oral contract of sale had been made, defendant made a payment thereon by check and at that time the contract was restated. After defendant had been called as a witness for plaintiff to prove payment of the check, he, as a witness in his own behalf, contradicted plaintiff's evidence as to payment and restatement of contract; he was asked on cross-examination, if the price of hops went down after the time of the alleged payment; this was objected to as immaterial and irrelevant and the answer received under objection and exception. *Held*, no error; that the evidence was competent as showing the interest of the witness.

While a party who has called a witness cannot impeach his general reputation for truth, he may contradict him as to any particular fact testified to, and this, although the evidence may collaterally have the effect of showing that the witness is generally unworthy of belief.

(Argued March 7, 1881; decided March 22, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon order made February 17, 1879, which affirmed a judgment in favor of plaintiffs entered upon a verdict. (Mem. of decision below, 17 Hun, 135.)

The case is reported upon a former appeal in 57 N. Y. 275.

This action was brought to recover the purchase-price of a quantity of hops alleged to have been sold by Richard Hunter, plaintiffs' testator, to defendants.

The proof on the part of plaintiffs was to the effect, that one of the defendants, who were partners, in September, 1877, looked at the hops in the hop-house and agreed to give Hunter fifty cents a pound for the lot and \$10 additional, which Hunter agreed to take. It was agreed that Hunter should shovel the hops through, bale them in a few weeks when they were dry enough and notify defendants, who were then to direct where they were to be delivered; Hunter baled and weighed the hops and notified one of the defendants, who promised to come out and take them; afterward Hunter went to defendants place of business, where the contract was restated, the weight of the hops was given, to wit, 2,370 pounds, the price was figured up at fifty cents a pound and \$10 added, thus show-

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ing the whole purchase-price; plaintiff then received defendants' check for \$200 to apply on the purchase-price, and defendants agreed to go out the next week, take the hops and pay the balance. The check was paid on presentation; defendants did not come for the hops or notify Hunter where to deliver them; he was ready and offered to deliver. At the close of plaintiffs' evidence, defendants' counsel moved for a nonsuit on the ground that the contract was void under the statute of frauds and that the check was no payment, within the meaning of that statute. The motion was denied and said counsel duly excepted.

The further material facts appear in the opinion.

*J. H. Clute* for appellants. The contract of sale was void under the statute of frauds, and was not saved by the payment of money in November subsequently. (2 R. S. 136, § 3, subd. 3; *Allen v. Aquina*, 5 N. Y. S. C. 380; *Sprague v. Blake*, 20 Wend. 61; *Brabin v. Hyde*, 32 N. Y. 519; *Hunter v. Wetsell*, 57 id. 375.) The payment must be made at the time and cannot be made at a time after making the contract. (3 Parsons on Contracts, 52, 822.) To constitute a payment as earnest or a part payment within the meaning of the statute of frauds, there must be an actual transfer or delivery of the thing or the money agreed to be given. (Chitty on Contracts, 348, 349; *Walrath v. Ingalls*, 64 Barb. 265, 277.) Until paid a check is merely an order upon a bank. (1 Daly, 500; *Minturn v. Fisher*, 4 Cal. 35; 14 La. Ann. 457; 30 N. H. 256; 3 Johns. Cas. 5; 21 Wend. 372; 25 id. 673; 6 Cow. 484.) Payment signifies delivery of money and performance of an obligation. (2 La. Ann. 24; Busbee's Law [No. Car.], 336; 69 Penn. St. 334.) The money must be actually paid; mere giving and taking it back will not suffice. (Browne on Statute of Frauds, 354; 7 Taunt. 597; 3 Duer, 426-441; 5 Hill, 200; 1 Hilton, 366; 10 Barb. 573; 12 id. 570; 30 id. 265; 33 id. 543; 44 id. 96; 49 id. 346; 32 N. Y. 519; 36 N. H. 311.) The drawing a check upon a bank is not a specific appropriation of the funds of the borrower to the pay-

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ment of that particular debt in preference to the holder of checks subsequently drawn. (*Dykers v. The Leather Manufacturers' Bank*, 11 Paige, 612-617; *Combs v. Bateman*, 10 Barb. 573; *Ireland v. Johnson*, 18 Abb. 392; *Manice v. H. R. R. Co.* 3 Duer, 441.) Treated as an executory contract of sale, the title remained in the plaintiff, and the most he can recover would be the difference between the contract-price and that at the time of the breach. (*Pierson v. Hoag*, 47 Barb. 243; *Baker v. Bourcicault*, 1 Daly, 23; *Russell v. Nicholl*, 3 Wend. 112; *Outwater v. Dodge*, 7 Cow. 85; *Ward v. Shaw*, 9 Wend. 404; *Evans v. Harris*, 29 Barb. 416.) The measure of damages for refusal to receive goods which the defendants have contracted to buy is only the difference between the contract-price and the value at time of breach, and, in the absence of any evidence of difference, the damages are nominal. (Story on Sales, § 438; *Billings v. Vanderbeck*, 23 Barb. 546; *Dustan v. McAndrew*, 10 Bosw. 130; *Wilson v. Holden*, 16 Abb. Pr. 133; *Allen v. Jarvis*, 20 Conn. 38; *Chamberlain v. Farr*, 28 Vt. 265.) A tender of the goods is an absolutely indispensable preliminary to an action for not receiving by the seller. (*Hagan v. King*, 38 Barb. 200.) If the buyer unreasonably refuses to accept goods which are perishable, the seller ought not to allow them to be spoiled on his hands, but they should be sold so as to hold the buyer liable for the true difference between the price brought and the price agreed upon. (*Danforth v. Walker*, 40 Vt. 257; *Ullman v. Kent*, 60 Ill. 271; Story on Sales, § 314; Schouler's Personal Property, 547.)

*E. W. Paige* for respondents. The contract was valid under the statute. (*Hunter v. Wetsell*, 57 N. Y. 375.) Payment by check was sufficient. (*Gould v. The Town of Oneonta*, 71 N. Y. 307; *Hawley v. Keeler*, 53 id. 114, 120, 121.) No tender of the hops was requisite. (*Muckey v. Howenstine*, 3 N. Y. S. C. [T. & C.] 28; *Crookshank v. Burrell*, 18 Johns. 58; *Higgins v. Murray*, 4 Hun, 565; 73 N. Y. 252; *Goddard v. Binney*, 115 Mass. 451.) The rule of damages was correct. (*Hayden v. Demets*, 53 N. Y. 426; *Bridgford v. Crocker*, 60 id. 627.)



FINCH, J. We are to assume as facts in this case, from the verdict of the jury, that an absolute contract for the sale of the hops, after they were weighed and baled, was entered into verbally by the parties, by the terms of which the hops were to be delivered where the defendants determined and requested, and were to be paid for within a few weeks upon such delivery, at the rate of fifty cents per pound with \$10 additional on the whole lot. Since the quantity of the hops, as baled and weighed, carried the price beyond \$50, we held upon a previous appeal that the contract was void within the statute of frauds, because no memorandum in writing was made, no part of the property delivered, and no portion of the purchase-money paid at the time of the transaction. The after payments of \$300 we decided to be insufficient to validate the contract, because when made there was no restatement or recognition of the essential terms of the contract. (57 N. Y. 375.) In the case as now presented the difficulty, fatal before, is claimed to have been obviated. There is proof of a restatement of the essential terms of the contract at the time of the delivery of the check for \$200. There is proof also contradicting such alleged fact. The question was left to the jury, under a charge from the court which does not seem to be the subject of complaint, and they, in rendering a verdict for the plaintiffs, necessarily found the fact of such restatement. That finding is conclusive upon us.

But it is now objected that, conceding the fact of such restatement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract-price of the hops, but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment "at the time" to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing

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deposit which remains until the check is presented. We must assume that the check of the vendee, in this case, was good when drawn and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was, therefore, an actual and real payment made by the vendees to the vendor, upon the purchase-price of the hops. It is said, however, that the actual payment of the money, as distinguished from the delivery of the check, was not "at the time" of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there was a payment "at the time," within the meaning of the statute, and that the contract of sale was valid. (*Artcher v. Zeh*, 5 Hill, 200; *Haroley v. Keeler*, 53 N. Y. 114; *Bissell v. Balcom*, 39 id. 275.)

It was further objected to the recovery that there should

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have been a tender of the hops. There was an offer to deliver. The place of delivery was to be named by the purchaser. He was informed, after the hops were weighed and baled, that they were ready for delivery. The vendor stood in the attitude of readiness to perform. He had done all that he could do until the vendee named the place of delivery. We think there was a sufficient offer of performance to enable the vendor to maintain his action for the purchase-price. (Story on Sales, § 314.)

No error was committed as to the measure of damages. The jury awarded to the plaintiffs the purchase-price, less the payments received. The case was not one of a merely executory contract in which the title had not passed. The vendor stood in the position of such complete performance as entitled him to recover the contract-price as his measure of damages. That the property was perishable does not alter the situation. He was not bound to sell the hops at auction after due notice and on account of the vendee. He might have done so, but was at liberty to abandon the property, treat it as the vendee's, and sue the latter for the price. (*Pollen v. Le Roy*, 30 N. Y. 556.)

The evidence as to the fall in the price of hops was not erroneously admitted. (*Lefler v. Field*, 52 N. Y. 621.) It was drawn out upon a cross-examination of the defendant. A question of fact had arisen in the case. The defendant contradicted, as a witness, the evidence given on behalf of the plaintiff as to payment upon the hops and a restatement of the contract. The truth was to be sought by the jury from the evidence of witnesses who sharply disagreed. Both could not be right. One was certainly wrong, either innocently or willfully. To aid a discovery of the truth, it was quite proper that the jury should understand the interest of the party testifying. It is true that in this case the defendant had been called by the plaintiff as a witness to prove the single fact of the payment of the check. Then followed a motion for a nonsuit, and after that the defendant was called in his own behalf and thereafter subjected to cross-examination. The objection to the inquiry as to the fall of price was not put upon any ground

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relating to the calling of the witness by plaintiff, but was merely that the proof was immaterial and irrelevant. The objection was not sound. It would not have been sound if founded upon the idea that plaintiff could not impeach his own witness. It is true that by calling him he represented him as worthy of belief, and was not at liberty to impeach his general reputation for truth or impugn his credibility by general evidence tending to show that he was unworthy of belief. That was neither the purpose nor effect of the evidence. Plaintiff was at liberty to contradict him as to the particular fact of there having been no restatement (*Thompson v. Blanchard*, 4 N. Y. 311), and this not only when it appeared that the witness was innocently mistaken, but even when the evidence might collaterally have the effect of showing that he was generally unworthy of belief. (*Lawrence v. Barker*, 5 Wend. 305; *McArthur v. Sears*, 21 id. 190; *Williams v. Sargeant*, 46 N. Y. 481.)

The interest of a perfectly credible and innocent witness may and often does color his recollection and mold and modify his statements, sometimes even insensibly to himself. The fact of such interest, where there is a contradiction in the evidence, is a proper subject for the consideration of the jury.

We discover, therefore, no error committed on the trial of this case and the judgment should be affirmed, with costs.

All concur, except DANFORTH, J., dissenting, and RAPALLO, J., absent. FOLGER, Ch. J., concurring in result.

Judgment affirmed.

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REBECCA B. MITCHELL, Executrix, etc., Respondent, v. CASSIUS H. READ, Appellant

The fact that a lease of premises, used by a firm for copartnership purposes, is to one of the copartners does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm.

M., plaintiff's testator, and defendant were formerly partners carrying on a hotel, the leases for which expired at the time fixed for the termination

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of the partnership. Prior to that time defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the leases declared and adjudged. It appeared that during the pendency of the action M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase-price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, good-will and leases if put up for sale together would have brought, the partners each having a right to bid at the sale. *Held*, no error.

(Argued March 8, 1881; decided March 23, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made March 12, 1879, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 9 Hun, 418.)

This action was commenced in March, 1870, by James L. Mitchell, the testator of the present plaintiff, to have it adjudged that certain leases obtained by defendant during the existence of a partnership between him and said Mitchell were taken for the benefit of the partnership, and were held by defendant as trustee, etc.

It is reported on the former appeal in 61 N. Y. 123.

Mitchell and defendant were partners in the business of keeping a hotel in the city of New York, known as the Hoffman House. They held the hotel and premises under leases which expired on the 1st day of May, 1871, and the copartnership between the parties, by the terms of their agreement, expired at the same time. In 1869, the defendant, without the knowledge or consent of Mitchell, procured in his own name a lease of the hotel and premises for another term to commence at the ex-

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piration of the partnership, and claimed the sole and exclusive right and benefits under the new lease.

Upon the first trial of the action the court held that the plaintiff had no right or interest under the new lease, and judgment was rendered accordingly for the defendant. Upon the appeal to this court the judgment was reversed, and a new trial directed, the court holding that the new lease and the good-will incident thereto belonged to the copartnership. It was proved upon the second trial that in March, 1871, just after the decision upon the first trial, and before any appeal had been taken therefrom, Mitchell commenced another action against the defendant herein, alleging that, owing to the disagreements between the parties in relation to the manner in which the new lease to the defendant had been taken, and his exclusive claim thereunder, and other matters, the partnership between the parties should be dissolved; and that the assets thereof, consisting of the leases, furniture, fixtures and personal property upon the leased premises, debts and credits and good-will belonging to the partnership, should be sold, etc. A receiver was appointed in said action, who was directed by the court to sell the furniture, fixtures and other assets to the parties, or either of them, or to any other person. Accordingly the receiver did sell to the defendant the fixtures, furniture and other household articles belonging to said firm and then being in said hotel, and also the books of account and debts due the firm; and the plaintiff also executed a bill of sale or instrument for the purpose of assuring and confirming said sale by the receiver; this sale was confirmed by the court in the decree or judgment in said action, on the 26th day of October, 1871, in which judgment, entered upon the application of the defendant, it is declared that said copartnership has been dissolved by affluxion of time, and that all the property and effects of said partnership have been by the receiver converted into cash, "except certain leases claimed to be partnership property of the plaintiff and defendant, which are the subject of a former action between them, now on appeal before the General Term," etc.; in said decree it was also adjudged, "that it appearing that the so-

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called renewal leases embraced in the complaint herein have been subjects of adjudication in said suit now on appeal, no judgment or decree respecting them is made in this action."

After proof upon the trial of the net profits of the Hoffman House during the partnership, this question was asked one of plaintiff's witnesses, an old hotel-keeper and experienced in the business, and was repeated in substantially the same terms to other witnesses having a like experience.

"Q. Assuming the statement made by Mr. McCarty, in regard to the net profits of the Hoffman House for the five years preceding the 1st of May, 1871, to have been as stated by him, and that the average annual net profits during those preceding five years were \$128,565, and that the net profits for the last year, immediately preceding the 1st of May, 1871, were \$147,883; can you state what was the value of the three new leases to which your attention has been called, extending from the 1st of May, 1871, onward, including the furniture and good-will, as on the 1st of May, 1871, to the partners Read and Mitchell, or either of them, or at a sale at which those partners, or either of them, or any other person, would be entitled to bid?" This was objected to on the ground among others that it improperly included the good-will of the house and the furniture. The objection was overruled and defendant's counsel duly excepted.

*W. O. Bartlett* for appellant. Tenant-right of renewal, wherever it exists, except by contract, is of feudal origin, and an incident of feudal tenure. (Wright's Introduction to the Law Tenures, 1-2; History of the Law of Tenures of Land, 39, 40, 41; 1 Spence's Equitable Jurisdiction, 12, 13; 2 Blackstone, 47, 53; *Watson v. Master of Hemsworth Hospital*, 14 Ves. 324.) Where a tenant-right of renewal does not exist by feudal custom, or by contract, it does not exist at all, and the phrase is a misnomer. (*Mitchell v. Read*, 61 N. Y. 140; Taylor's Landlord and Tenant, note 211; 1 Platt on Leases, 705; *Watson v. Master of Hemsworth Hospital*, 14 Ves. 332,

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338.) If there was any tenant-right of renewal it was in Cassius H. Read, the assignee of the original lease, and not in the firm of Mitchell & Read, who were only his sub-lessees. (*McFarlan v. Watson*, 3 N. Y. [3 Comst.] 286; 1 Washb. on Real Property, 447; *Martin v. O'Connor*, 43 Barb. 522.) There was no violation of trust on the part of Read. (Sandf. Ch. 407; *Featherstonhaugh v. Fenwick*, 17 Ves. Jr. 298, 311.) The measure of damages adopted by the court below was erroneous. (*Creetwell v. Lye*, 17 Ves. 335; *Morgan v. Schuyler*, 79 N. Y. 493.) Good-will is not a commodity on which a specific value can be placed, or for which a definite allowance can be made. (Story on Partnership, § 99; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Chenton v. Douglas*, Johns. Ch. 174; *Ex parte Thomas*, 12 M., D. & DeG. 294; *Costake v. Lill*, 1 Russell, 376; *Davies v. Hodgson*, 25 Beav. 177.) There can be no such thing as good-will, except as connected with a business. (*Robertson v. Quiddington*, 28 Beav. 529; *Wedderburn v. Wedderburn*, 22 id. 84; Collyer on Partnership, § 162; *McFarland v. Stewart*, 2 Watts, 111.) The business having expired by its own limitation, and the assets having been sold out by a receiver and the plaintiff, at his instance, there was nothing to which good-will could attach. (61 N. Y. 140; *Musselman's Appeal*, 52 Penn. St. 82; *Robertson v. Quiddington*, 28 Beav. 529; *Wedderburn v. Wedderburn*, 22 id. 84.) The partnership having been closed up at the instance of the plaintiff, and all the property, with the exception of the renewal leases, having been sold to the defendant, the good-will, if any, passed with that sale. (Collyer on Partnership, 288-290; *Banks v. Gibson*, 34 Beav. 566; *Hall v. Hall*, 20 id. 141; *McFarland v. Stewart*, 2 Watts, 111; *England v. Downs*, 6 Beav. 269; *Berry v. Bedford*, 4 De G., J. & S. 352.)

*John E. Burrill* for respondent. The leases in question belonged to the firm of Mitchell & Read, and formed a part of its assets, and defendant, as trustee for the firm, was bound to account to the plaintiff in respect thereto. (61 N. Y. 123,



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143.) The leases taken by Read in his own name during the existence of the partnership of Mitchell & Read, and without the knowledge of his copartner, inured to the benefit of the firm, and Read was bound to account to the plaintiff's intestate as trustee in respect thereto. (61 N. Y. 132, 136.) When on a dissolution one partner obtains exclusively the benefit of the good-will, and is made accountable for it, the court, in ascertaining its value, considers what it would have produced if sold in the most advantageous manner, and at the proper period of time. (*Mellish v. Keen*, 28 Beav. 453; *Smith v. Everett*, 27 id. 446; Collyer on Partnership, § 322 and note; *Bagley v. Smith*, 6 Seld. 489; *Wade v. Jenkins*, 2 Giffard's Ch. 509.) The good-will of the business formed a part of the assets of the partnership, and as the defendant, by means of the leases, appropriated this to his own use, he is bound to account to his copartner for its value. (*Dougherty v. Van Nostrand*, 1 Hoff. Ch. 269; *Williams v. Wilson*, 4 Sandf. Ch. 380; *Curtwell v. Lye*, 17 Ves. 346; *Crawshay v. Collins*, 15 id. 224; Collyer on Partnership, § 162; *Martin v. Van Shaick*, 4 Paige, 480; 61 N. Y. 123; *Hall v. Barrows*, 32 L. J. Ch. 548; *Stewart v. Gladstone*, 38 L. T. R. [N. S.] 557; *S. C.* 47 L. J. Ch. 423.) In ascertaining the value of the leases, the good-will which the defendants thereby secured was properly taken under consideration. (*Boon v. Moss*, 70 N. Y. 465; *Morgan v. Schuyler*, 79 id. 490; *Williams v. Wilson*, 4 Sandf. Ch. 380; *Dayton v. Wilkes*, 17 How. Pr. 510; *Cartwell v. Lee*, 17 Ves. 346; *Crawshay v. Collins*, 15 id. 224; Collyer on Partnership, § 162; *Martin v. Van Shaick*, 4 Paige, 480; 61 N. Y. 123.)

FOLGER, Ch. J. The adjudication in this case, announced in 61 N. Y. 123, is binding upon the parties, and hence upon the court, unless a state of facts materially different from that there presented was shown upon the last trial. We do not understand that upon the vital question in the case such difference is claimed, save in this: that before, it did not appear but that the leases in the first instance were to the parties jointly, while

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now it is shown that the leases, for the most important and useful part of the premises, were to the defendant alone, directly or by assignment. This fact does not affect the principle on which the former adjudication was based, for it is said to be a universal rule that no one who is in possession of a lease, or a particular interest in a lease, which is affected with any sort of an equity in behalf of third persons, can renew the same for his own use only, but such renewal must be considered as a graft upon the old stock. (See *Moody v. Matthews*, 7 Ves. 185 [Sumner's ed.], note.) It is well to observe, also, that it is noticed in the opinion of DWIGHT, C., in 61 N. Y. (*supra*), that the leases in the case in hand were in different forms and rights, some being to the party directly, and others, "through a series of transactions, \* \* \* vested \* \* \* in the partnership." It is for us, then to inquire, only whether there were errors committed in the conduct of the last trial.

It is claimed that the measure of damages adopted by the trial court was erroneous. The question put to the witnesses, who were called by the plaintiff to speak to the damages, assumed that it was proper to consider the furniture and good-will as put up for sale together with the leases, and that the parties, or either of them, had a right to bid, and that what those three together would bring at such a sale was a basis for a computation of damages.

It is objected that the furniture and the good-will were not proper constituents in the inquiry. The furniture had already been sold with a confirmation of the sale by the plaintiff's testator, and the purchase-price had been paid by the defendant.

But that sale was brought about as a necessity of the termination of the partnership of the parties, and not as an interference by the plaintiff's testator and a voluntary or willful act on his part. As the matter stood when this suit was begun, the testator was entitled to an interest in the leases renewed, in the furniture, and whatever else was a thing of partnership value. It is manifest that the property of a partnership engaged in the business of keeping a public house is more valuable if that property may be kept together at the place of business to which

the customers were used, and in the hands of those to whom they were used, with the right to carry on the same business at that place by the same proprietors for a fixed term, than if put up for sale with the need upon most bidders for it, including one of the partners, of taking it elsewhere into other business or into a new place for the same business. The defendant had done damage to the testator by bringing about that last-named state of things, and one element of that damage was the diminution in value to the testator of his interest in the property as thus affected.

So it was an element in the estimate of damage, what the property would have brought, had there gone with the sale of it the right to keep it on at the same place in the same business. The law's delay, and the course of events, had precluded the plaintiff's testator from an enjoyment of the leases, and there was no practicable way of learning what was his damage from the act of the defendant, but to inquire what the leases and property would have been worth if still united in interest and enjoyment, and thus offered for sale. It is not claimed, but that the suit of the testator to dissolve the partnership and to close its affairs and to convert its assets into money for division was well brought and properly closed. The leases would have been made a part of the assets then sold or disposed of, had it not been for the pendency of this suit, brought to overcome the resistance of the defendant to the testator's claim of a right therein. The leases were excepted from the judgment in the other suit, because of this litigation. But for it they would have been sold at the same time with the other property, and the product of all thus sold would have been the avails in which the testator would have shared. It is the right of the plaintiff now to be put as nearly in that position as is possible, and the practicable way to do that is to find out what would have been the result in money if she or her testator had then been therein. We think that there was no error in making the assumption on which to get the judgment of the witnesses, so far as the furniture, stock in trade, and accounts current and the like were concerned.

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The matter of the good-will is made a subject of separate consideration in the points of the defendant. That there is such a thing as good-will, which is a matter of value in such a business, is not to be denied, nor that it is a part of the assets of a copartnership in that business. Doubtless, some of it, as is suggested by the learned counsel for the defendant, grows from satisfaction of customers with the individuals composing the partnership. The manifestation of it is, however, so much attached to the place at which the business has been done, as that it enhances the value of the lease of the place to the partners jointly, or to any one of them. Hence it has generally been held that, where a lease is partnership property, the good-will of the business enters into the value of the lease, and affects the amount of the purchase-price. The good-will of the business of the testator and the defendant was a valuable matter in which they had a joint interest,—it was a part of their joint property. There could be no just and equable division thereof between them without each got his share thereof. If his share was to be had by a sale of the joint assets, that good-will must then be sold, or he would not have his share, and to reach its full value it must go with the lease of the place. And inasmuch, because of the matters above stated, the leases could not be sold at the time other property was sold, it was proper to consider what would have been the value of both, had they been sold together. The question also assumed that the partners, or either of them, had a right to bid at the sale of the leases. This is criticized, for that this suit proceeds on the ground that the defendant had no right to obtain the leases to himself to the exclusion of the testator, and that, if that ground be well taken, he would have no right to bid at the sale. Manifestly there is a difference between acquiring the leases from the landlord privily, to the wrong and harm of the co-tenant and copartner, and publicly bidding at a judicial sale of them with the sanction of the court, and on no more than equal terms with all others interested. Nor is the point of merit that the copartnership having expired of its own limitation the matter of the good-will could not enter into consideration. The wrong

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of the defendant began before the partnership had terminated, and it consisted in prematurely and privily obtaining the leases without giving his copartner a chance to seek the same, either jointly or solely. If that chance had been given the testator, he could have put his own estimate on the good-will and brought that estimate into the data on which to make up his offer for a lease, or in some other way he might have been compensated for his share in it. It is claimed that the good-will went with the sale and transfer of the property of the parties other than the leases. Grant that it is so. That does not preclude the plaintiff from an inquiry of what would have been its value had the leases accompanied the rest of the property. She has now had it determined that her testator had a right in the new leases. That was not then adjudged. In an inquiry into the damages for having that right denied and refused, it is competent to ask how the sale of the leases with the good-will would have affected the value of the latter. Nor is it a matter that works a total denial of damages, that the testator went into business in rivalry with the defendant, and in proximity to him. If that is a matter to enter into the estimate of damages, we cannot say that it did not.

These views cover the points made by the defendant

We think that the judgment should be affirmed.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellants, v. THE  
NEW YORK AND MANHATTAN BEACH RAILWAY COMPANY et al.,  
Respondents.

An action to recover real property is not within the purview of the act of 1875 (chap. 49, Laws of 1875), authorizing actions to be brought by the people of the State to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the

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act is to be construed as referring to property of the same general character.

The said act was not intended to confer jurisdiction to review by means of an action as therein prescribed the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation or violence.

Accordingly *held*, that an action by the people was not maintainable under said act to recover lands of a town, the title to which, it was alleged, had been wrongfully acquired, through the wrongful interference of its servants and agents with the action of a town meeting; they procuring the passage of a vote authorizing the conveyance of the lands for a grossly inadequate sum, by the action of persons not legal or qualified voters.

(Argued March 8, 1881; decided March 22, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department; entered upon an order made the second Monday of September, 1880, which reversed a judgment in favor of plaintiff, entered upon an order overruling a demurrer to plaintiff's complaint. (Reported below, 22 Hun, 95.)

The nature of the action and the material allegations of the complaint are set forth in the opinion.

*Benjamin G. Hitchings* for appellant. The cause of action set out in the complaint is within the statute (Laws of 1875, chap. 49), so as to sustain a suit by the people under that statute. (New Code, § 1969.) A county is a corporation, and included in the words "municipal or other public corporation." (*People v. Ingersoll*, 58 N. Y. 28.) This case is within the spirit and directly within the object and intent of the statute. (*People v. Ingersoll*, 58 N. Y. 1; *People v. Fields*, id. 491; id. 44; *People v. Tweed*, 63 id. 207.) Even if the defendant is entitled to a return of the money the want of an averment of a tender or offer is not a ground of demurrer. (*Thompson v. Commissioners*, 79 N. Y. 54; *Allerton v. Allerton*, 50 id. 670; *Hay v. Hay*, 13 Hun, 315.) In cases of actual fraud or wrong the wrong-doer has no equity, and will not be allowed even at the hearing for money expended in perpetrating the wrong, or for improvements upon the property wrongfully obtained.

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(*Sands v. Codwise*, 4 Johns. 536; Bump on Fraud. Convey. [2d ed.] 594; 23 Penn. St. 321.) The position of defendants, that the plaintiff should have offered in the complaint to restore the consideration, is entirely without force. (*Livingston v. Harris*, 3 Paige, 528; *Sudd v. Seaver*, 8 id. 554; *Cole v. Savage*, 10 id. 583; *Schermerhorn v. Tallman*, 14 N. Y. 129.)

*Alfred C. Chapin* for respondents. Chapter 49 of the Laws of 1875 was passed to facilitate prosecutions against certain public officers, and prosecutions under it against others cannot be maintained. (*People v. Tweed*, 5 Hun, 356, 382; 63 N. Y. 202; id. 194; *People v. Starkweather*, 42 Super. Ct. 325.) As this statute derogates from the common law, it must be strictly construed. (*Dewey v. Goodenough*, 56 Barb. 54; *Burnside v. Whitney*, 21 N. Y. 148; *People v. Gates*, 57 Barb. 291; *Lease v. Vance*, 28 Iowa, 509; *State v. Woodson*, 41 Mo. 227; *O'Brien v. State*, 12 Ind. 369; *Newell v. Wheeler*, 48 N. Y. 486.) It was necessary to show that an offer has been made to restore the consideration. (*People v. Canal B'd*, 55 N. Y. 390; *Town of Springport v. Teutonia Sav. Bk.*, 75 id. 397, 407; Code, §§ 488, 490.) There is no cause of action until the town rescinds the contract of sale. (*Baker v. Robbins*, 2 Denio, 136.)

ANDREWS, J. We think the demurrer in this case was well taken.

The action is brought under the assumed authority of the act chap. 49 of the Laws of 1875 to recover possession of certain common lands in the town of Gravesend, granted in 1645 by a charter of the Dutch government, subsequently confirmed by the English colonial government, to certain freeholders and inhabitants of said town and to their successors, for the use of the town, which lands, the complaint alleges, are now the property of the town.

The complaint charges that the defendant, The New York and Manhattan Beach Railway Company, wrongfully acquired possession of the lands in controversy, and subsequently, by wrongful interference by its servants and agents with the

action of the town meeting of the town of Gravesend, and by obtaining control of the same by the action of persons not legal or qualified voters, procured a vote to be passed authorizing the lands to be conveyed to the company by the commissioners of common lands of the town, for a grossly inadequate consideration, and that a conveyance has been executed in pursuance of the action of the town meeting. The complaint further alleges that the railway company has conveyed a part of the lands to the other defendant, and that the property has been obtained by the defendants without right and is still so held by them, and demands judgment among other things that the conveyance purporting to be executed in behalf of the town be set aside, and that the defendants be adjudged to surrender possession of the premises.

It is conceded that, except for the act of 1875, the action could not be maintained. The common lands under the colonial grants belonged to and were held by the town as a corporation. (*Denton v. Jackson*, 2 Johns. Ch. 325; *North Hempstead v. Hempstead*, 2 Wend. 109.) The town had full power over them, having the same rights of control and disposition as any other owner has of his property, subject only to the trust for the public use under which they were held. The State had no title to the lands and no right to the possession, and independently of the act of 1875 it could maintain no action to recover them. (*People v. Ingersoll*, 58 N. Y. 1.) The question now presented is whether it can maintain the action under that act.

We are of opinion that an action to recover real property is not within the purview of the act. The act applies to "money, funds, credits and property," without right obtained, received, converted and disposed of, etc. The word *property* describes any estate, whether goods, money or lands, and in its general signification includes any thing capable of ownership. But the meaning of a statute is to be found by comparing all its parts, and particular words may be limited if on such comparison it appears that they were used in a limited or restricted sense. So, also, the circumstances which led to its enactment may



sometimes be considered in aid of the interpretation. (*Tonnele v. Hall*, 4 Comst. 140.) It is matter of common history that the statute of 1875 was passed in view of the fact that the city of New York had been grossly defrauded by the acts of municipal officers and others acting in collusion with them, and that large sums had been taken from the municipal treasury in the perpetration of the frauds committed. These sums the city or county, one or both of them, might sue for and recover, but resort to this remedy was embarrassed by the fact that the city and county governments were to a considerable extent under the control of the guilty participants in the fraud. This court decided that the State had no such title to the funds and property thus wrongfully embezzled and converted as would enable it to maintain an action to recover them, and the act of 1875 was passed to afford such remedy. There was no public exigency which required that a remedy by an action in behalf of the State should be provided for the recovery of the possession of real property of a town or municipal corporation, wrongfully obtained or withheld, and there is no hint in the act of an intention to provide such a remedy unless it is found in the use of the word *property* in the first section. It is to be observed that the word *property* follows the enumeration of specific kinds of personal property. The words are "money, funds, credits and property." If it had been intended that the statute should have applied to all property, real and personal of a municipal or other public corporation, obtained without right, these general and comprehensive words would naturally have been used. The word *property*, associated as it is with the preceding words of specific description, is to be construed as referring to property of the same general kind with that previously enumerated, upon the maxim *noscitur a sociis*.

But a consideration of other provisions of the act leads to the same conclusion. The *first* section declares that on the commencement of a suit by the State, all the money, funds, credits and property sued for, and the right of action for the same, shall be forthwith vested (if not so previously vested) in the State. It then provides for a limitation of ten years for

bringing an action by the State under the statute. This limitation is substantially the limitation which has been applied to actions in equity for breaches of trust, but actions for the recovery of real property, according to the general statute, may be brought at any time within twenty years after the cause of action accrued. If the statute intended to vest in the State a right to recover lands of a town or municipality, wrongfully obtained or withheld, why should there have been in respect to the period of limitation such a departure from the general policy of the law? The *third* section provides for the disposition of the proceeds of a recovery in an action under the statute, and declares that where any money, funds, credits, property, damages or compensation has been recovered, the court may "make such order and judgment as may be just and equitable for the disposition of the *proceeds* of any recovery in such action, so as to reinstate the lawful custody which was disturbed or impeded by the wrong complained of, or to cause application of such proceeds to be made to the objects and purposes for which such money, funds, credits and property was authorized to be raised or procured," etc. This language is very inapt and inappropriate, if the act intended to authorize an action for the recovery of real property. To reinstate the lawful custody, etc., is at least an unusual use of language to describe the act of restoring possession of real property to its lawful owner. The order which the court is authorized to make, on a recovery by the State, is one for the distribution of *proceeds* or for their application to the objects for which the money, property, etc., was authorized to be *raised or procured*. The language of this section is sensible and clear if the act is considered as relating to actions for money, credits and personal property, but is awkward, and in some particulars unmeaning, if the act applies to the recovery of real property.

The main object of the act, as is evident, was to give an additional remedy for the plundering of municipalities by faithless and venal officials, and to authorize the State to pursue the funds wrongfully abstracted from their treasuries into the hands of officials or other persons who had wrongfully obtained or received them. But we think it would be a strained con-

struction of the statute to extend it to the recovery of real estate belonging to a municipality, the possession of which has been wrongfully acquired or is wrongfully withheld. If it is desirable to extend the act to such cases, the remedy is with the legislature.

There is another answer to the claim that the act of 1875 applies to the case. The deed sought to be set aside purports to be, and is, the formal act of the town, executed by its accredited authorities, pursuant to a vote of a town meeting regularly called and held, having authority to direct the alienation of the common lands. The wrong claimed is that the vote of the town, as recorded, was not the vote of a majority of the qualified electors, who were outnumbered and outvoted by persons procured to attend the meeting by the defendants. The interference of the State is invoked, under color of the act of 1875, to protect the town against an injury resulting from the miscarriage of the system of town meetings, as agencies for the management and control of local affairs and interests. We do not think such an interference by the State was contemplated. The people in town meetings act directly, in exercising such legislative and administrative powers as are committed to or as are possessed by towns. The remedy for unlawful interruption of or interference with the business of town meetings is ample. A city acts through its common council and executive and administrative officers, who are mere agencies of the municipality; but not so in the case of towns. The people in town meetings act in their primary, and not in a representative capacity. The act of 1875 was not intended to draw to the central authority, jurisdiction to review or revise the proceedings of towns in town meetings, or to set them aside, upon the allegation that the action of a town meeting was produced by corruption, intimidation, or violence. The system of town government may not be sufficiently guarded, but the remedy for defects is not to be found in the act of 1875.

The judgment should be affirmed.

All concur, except MILLER, J., not voting, and RAPALLO, J., absent.

Judgment affirmed.

EDWARD A. GREENE, Respondent, v. THE REPUBLIC FIRE  
INSURANCE COMPANY, Appellant.

This action was brought upon a judgment obtained in the State of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. R. G. & Co. That action was brought by the members of the firm, as stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. It appeared that the rule of the common law, that choses in action are not assignable, and that actions thereon when assigned must be brought in the name of the assignor, prevails in said State, and that the laws of said State authorized, in case of assignment, a statement such as was contained in the declaration. *Held*, that the judgment-roll furnished presumptive evidence that plaintiff was the owner of the judgment; that the plaintiff in such an action is merely a nominal party having no interest in or right to control it; nor is he a trustee in any rightful sense under the Code, and so plaintiff alone could sue upon the judgment.

It appeared that said firm was indebted to plaintiff and that there was an understanding between them that he should have the benefit of the policy; that after the loss, in pursuance of such understanding, the policy was sent to him by the firm to collect and apply proceeds upon his claim, together with an order upon defendant, expressing a consideration, requesting it to pay the amount to plaintiffs, and stating that his receipt would be a full discharge. *Held*, that the order was virtually an assignment transferring the policy; also that the understanding and delivery of the policy in pursuance of it operated as a valid transfer.

(Argued March 9, 1881; decided March 22, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made April 7, 1880, reversing a judgment in favor of defendant, entered upon a decision of the court on trial without a jury and granting a new trial.

This action was brought upon a judgment of the Circuit Court of Warren county in the State of Mississippi.

That action as appeared by the record was brought and judgment recovered by William R. Greene and others, composing the firm of William R. Greene & Co., for the use of plaintiff upon a policy of insurance issued to that firm by defendant.

The further material facts appear in the opinion.

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Opinion of the Court, per MILLER, J.

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*Samuel Hand* for appellant. The assignment in trust to Henry L. Greene made him trustee of an express trust, and he alone could sue. (*Western R. R. Co. v. Nolan et al.*, 48 N. Y. 513; *Weetjen v. Vibbard*, 5 Hun, 265; *Meth. Ch. v. Stewart*, 28 Barb. 551; *Cummins v. Barkalow*, 4 Keyes, 514.) All actions must be brought in the name of the assignor or legal owner. (*Jessel v. Ins. Co.*, 3 Hill, 88.) The party holding the legal title is the real party in interest under the Code, although others may have a beneficial interest in the proceeds, and he would even be liable to them as debtor. (*Allen v. Brown*, 44 N. Y. 228; *Meeker v. Claghorn*, id. 349; *Fulton v. Fulton*, 48 Barb. 581; *Ward v. Van Bokkelen*, 2 Paige, 295, 296; *Cumming v. Morris*, 25 N. Y. 625; *Peck v. Yorks*, 75 id. 421.) The plaintiff is not the proper party to bring the suit, in any aspect of the case as presented. (*Sattery v. Sattery*, 4 Sandf. Ch. 31.) The plaintiff having by his own act procured the judgment in favor of other parties, he has no standing in this court. (2 Addison on Contracts, 527.)

*Luther R. Marsh* for respondent. The Mississippi judgment record was, of itself, enough to entitle the plaintiff to a verdict. (*Rollo v. Hackett*, 2 Bosw. 579; *Morton v. Morton*, 13 Serg. & Rawle, 107; *Welch v. Mandeville*, 1 Wheat. 233, and note on p. 237; *McCullum v. Cox*, 1 Dallas, 139; *Canby v. Ridgeway*, 1 Binney, 496; *Southgate v. Montgomery*, 1 Paige, 41-47.) A chose in action may be assigned by parol and delivery. (*Hooker v. Eagle Bank*, 30 N. Y. 83; *Bedell v. Carll*, 33 id. 581; *Doremus v. Williams*, 4 Hun, 458; *Mack v. Mack*, 3 id. 323.) An equitable assignment is, under the Code, a legal assignment. (*Hooker v. Eagle Bk.*, 30 N. Y. 83; *Doremus v. Williams*, 4 Hun, 458.)

MILLER, J. This case involves the question whether the plaintiff was the actual owner of the judgment on which this suit was brought. We are of the opinion that he was such owner, and as the real party in interest, within the provisions of the Code, the action was properly commenced in his name.

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iff to maintain this action do not, we think, demand discussion.

The claim of the defendant's counsel that the plaintiff was in no situation to raise the points presented, as the General Term did not reverse upon the facts, cannot be upheld. Several requests to find were made by the plaintiff which were refused, and exceptions severally taken to the same. The refusals to find that the judgment was obtained by the plaintiff in the name of the firm as nominal plaintiffs — that being the firm in Mississippi — that the policies were the property of the plaintiff, and that the plaintiff was the real party in interest in the action and the rightful owner of the judgment, as well as the refusals to find according to some other requests made, which it is not necessary to enumerate, and to each of which an exception was taken by the plaintiff, were erroneous, as the facts stated therein were sufficiently established. The plaintiff's appeal to the General Term covered these rulings, which furnish sufficient ground for the reversal of the judgment and the granting of a new trial.

The judgment of the General Term was right and should be affirmed, and under appellant's stipulation judgment absolute should be ordered for the plaintiff.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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WILLIAM B. NEWBERRY et al., Appellants, v. MICHAEL W. WALL, Survivor, etc., Respondent.

A broker's note or memorandum of sale of goods, containing the names of the vendor and vendee and the terms of sale, and delivered to both parties makes a valid contract of sale within the statute of frauds.

In an action to recover the purchase-price of goods alleged to have been sold, to arrive, by plaintiffs to defendants, through a broker, it appeared that the broker entered the contract of sale in his book, made two copies thereof, one of which he delivered to the plaintiffs and sent the other by his clerk to the defendants in the usual course of business; that subse-

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quently the broker had a conversation with one of the defendants as to the purchase, and informed him that he had executed the broker's note; that after the arrival of the goods defendants requested plaintiffs to enter the goods at the custom house in bond, which they did and then sent defendants an order for the goods and an account of the sale, to which no objection was made; that defendants made arrangements with warehousemen to store the goods, stating they had bought them, and that subsequently they rejected the goods on the ground that the quality was inferior to that contracted for. The defendants did not deny, as witnesses, the receipt of the broker's note. *Held*, that the evidence of such receipt was sufficient to require the submission of that question to the jury, and that a nonsuit was error.

(Argued March 9, 1881; decided March 22, 1881.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 22, 1881, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiffs on trial.

This action was brought to recover the purchase-price of one thousand bales of Dowrah jute alleged to have been sold by plaintiffs to the firm of William Walls' Sons, of which firm defendant is the surviving partner.

It is reported on a former appeal in 65 N. Y. 484.

The sale was made through a broker and the terms thereof, as claimed by plaintiffs, were stated in a broker's note received by them, and a duplicate of which they claimed was sent to and received by defendants' firm. The note is as follows:

"DANIEL L. STURGES,  
Hemp Broker, 111 Wall Street, }  
NEW YORK, May 25, 1870.

Sold for Messrs. Newbery & Son, to Messrs. Wm. Wall's Sons, 1,000 bales Dowrah jute, shipped at London for New York, per ship "American Congress," in good order and free from damage, at 5½¢ per lb. gold, cash, payable in fifteen days from delivery alongside ship. Purchasers to advance gold for duties.

Bkg. 1.20 per cent.

DANIEL L. STURGES, *Broker*."

The further material facts are stated in the opinion.

## Statement of case.

*F. R. Coudert* for appellants. There was a valid contract in writing, signed by the broker, Sturges, acting as agent for both parties. (*Butler v. Thompson*, 92 U.S. 412; *Merritt & Merritt v. Clason*, 12 Johns. 102; *Ex'rs of Clason v. Merritt*, 14 id. 484; *Justice v. Lang*, 42 N. Y. 493.) There was a valid delivery by the plaintiffs to the defendants and a receipt and acceptance by them, sufficient to take the case out of the statute of frauds; at least the evidence was sufficient to entitle the plaintiffs to go to the jury. (Hilliard on Sales, 229; Benjamin on Sales, § 144.) The acceptance of goods, or part of them, as required by the statute, may be constructive only, and the question whether the facts proven amount to a constructive acceptance is one of fact for the jury. (*Caulkins v. Hellmann*, 47 N. Y. 449; *Gray v. Davis*, 10 id. 285; Story on Sales, § 311.) The long delay which elapsed between the delivery of the goods and the letter rejecting them was of itself, alone and unexplained, sufficient to put the defendants upon their proof. (*Reed v. Randall*, 29 N. Y. 358; *Ely v. O'Leary*, 2 E. D. Smith, 355; Benjamin on Sales, § 162; *Hargous v. Stone*, 5 N. Y. 73; *Parks v. Morris A. T. & Co.*, 54 id. 592; *Garfield v. Paris*, 96 U. S. 563.) Receiving and keeping the bill was *per se*, unexplained, sufficient to throw the burden upon the defendants. (Abbott's Tr. Ev. 461.) A delivery by a vendor to a specified carrier of the goods purchased, in pursuance of the verbal order and direction of the purchaser, is in law a delivery to the latter, and *ipso facto* an acceptance by him of the property. (*Glen v. Whitaker*, 51 Barb. 451; *Carter v. Toussaud*, 5 B. & Ald. 855; *Rodgers v. Phillips*, 40 N. Y. 510; Benjamin on Sales, §§ 148, 149, 163, 175; 19 L. J., Q. B., 382; 15 Q. B. 458.) A mere difference in the language of the bought and sold notes will not constitute a variance, if the meaning be the same, and evidence of mercantile usage is admissible to explain the language, and to show that the meanings of the two instruments correspond. (Benjamin on Sales; *Bold v. Rayner*, 1 M. & W. 342; *Rogers v. Hadley*, 2 H. & C. 227; *Kempson v. Boyle*, 3 id. 763.) The court should be extremely cautious in



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interfering with the province of the jury, who, by the principles and plan of our jurisprudence, have exclusive jurisdiction over the facts of the case. (*Labar v. Koplen*, 4 N. Y. 547, 548; *Stuart v. Simpson*, 1 Wend. 376; *Cook v. N. Y. C. R. R. Co.*, 3 Keyes, 476, 477; *Howell v. Gould*, id. 422; *Dunham v. Troy Union R. R. Co.*, id. 543; *Scofield v. Hernandez*, 47 N. Y. 313, 316; *Stone v. Flower*, id. 566; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 id. 465; *First Nat. Bank of Springfield v. Dana*, 79 id. 109; *Low v. Hall*, 47 id. 104; *Thomas v. Lumley*, 50 How. Pr. 108.)

*Richard H. Huntley* for respondent. The contract was void under the statute of frauds, and there was no acceptance of the jute. (*Stons v. Browning*, 68 N. Y. 598; 51 id. 211; *Heermance v. Taylor*, 14 Hun, 149.)

EARL, J. The plaintiffs sued the defendants in 1870, to recover the price of the Dowrah jute now in question. The defendants defended that action upon the ground that the contract of sale was invalid under the statute of frauds, and also upon the ground that the jute was not of the quality required by the alleged contract. The plaintiffs were nonsuited, and then appealed to the General Term and the Commission of Appeals, and the judgment of nonsuit was sustained upon both grounds. (35 Super. Ct. 106; 65 N. Y. 484.) The plaintiffs then commenced this action and the defendants again defended upon the same grounds, and the plaintiffs were again nonsuited upon the ground that the contract of sale was invalid under the statute of frauds; and upon that ground the judgment of nonsuit was sustained upon appeal by the plaintiffs to the General Term.

On the last trial there was evidence tending to show that the jute was of the quality required by the alleged contract, and hence, if there was a valid contract, the plaintiffs were improperly nonsuited. The sole question, therefore, for our consideration is whether there was a valid contract, or evidence tending to show there was, which should have been submitted to the jury.

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In the prior case the Commission of Appeals impliedly decided that if the broker's note of the sale had been delivered to the defendants as well as to the plaintiffs, there would have been a valid contract of sale within the statute of frauds, and such is the law (*Merritt v. Clason*, 12 Johns. 102; 14 id. 484; *Butler v. Thomson*, 92 U. S. 412); and so the learned counsel for the plaintiffs conceded it to be on the argument before us. It was held in the prior case that there was not sufficient evidence that the broker's note was delivered to the defendants, and so the trial judge held in this case in nonsuiting the plaintiffs.

We have carefully compared the evidence given upon this trial with that given upon the former trial, and so far as it bears upon the delivery of the broker's note, it is not precisely the same. The difference is not great or marked, but sufficient to call for a different disposition of the case. There was no evidence that the broker's note was not delivered to the defendants and the evidence did not show certainly that it was so delivered, but we do not see how it can well be doubted that there was evidence sufficient for submission to the jury upon the question of such delivery, and we will briefly call attention to it. In May, 1870, the plaintiffs had notice of the shipment to them of the jute from London, and they employed the broker to sell it. He called upon the defendants and offered it to them, and they made an offer for it which he communicated to the plaintiffs and they accepted it, and then he informed the defendants of the acceptance and they replied that it was all right. He then entered the contract of sale in his book, and made two copies thereof, signed by him, and sent one copy, called the broker's note, to the plaintiffs which they received, and he sent the other copy to the defendants, and as stated above, there is no positive or direct evidence that they received that. He sent it in the usual course of his business by one of his clerks, a boy fifteen or sixteen years old. The boy was not sworn, and at the time of the trial was probably dead. From the fact that it was thus sent there is a strong probability that it reached the defendants, particularly as

neither of them was called as a witness to deny that they received it. While the mere fact that it was thus sent, was not sufficient evidence that they received it, but little additional evidence was needed to authorize a jury to infer that it did reach them. This was on the 25th day of May. The broker testified that subsequently he had a conversation with one of the defendants as to his purchase of the jute, and informed him that he had executed the broker's note.

The jute arrived in the latter part of July, and the plaintiffs then notified the defendants of its arrival, and called upon them for the gold to pay the duties. The defendants, instead of paying the gold, as required by the contract, requested the plaintiffs to enter the goods at the custom house in bond, which they did; and then they delivered to the defendants an order on the vessel for the jute, and sent them an account specifying the quantity of jute in bales and pounds, and debiting them for the purchase-price thereof, to which the defendants made no objection. The defendants then made an arrangement with warehousemen to store the jute, informing them that they had bought it, and after the warehousemen had commenced carting the jute, the defendants informed them that they had seen the jute, did not think it was such as they had bought, thought they should reject it, and told them not to store it on their account. The warehousemen, notwithstanding this, stored the jute on account of whom it might concern. A few days later the defendants informed the warehousemen that they had concluded positively to reject the jute, and they then addressed a letter to the plaintiffs, in which they stated as follows: "On examination of the 1,000 bales of jute we bought of you we find the whole to be in most respects different from any usually imported under that name. The quality is so inferior that it is not fit for manufacturing purposes, totally unsalable and unmerchantable, and hence we regret to inform you that we reject it and give up the purchase."

The defendants were business men, and must be presumed to have known what was essential to a valid contract, and all their conduct indicates that they supposed they had made a

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valid contract. They were informed that the broker had executed the broker's note; they subsequently admitted that they had bought the jute; they accepted an order for its delivery, and dealt with it as if they had bought it and had the right to control it. They finally rejected it, not on the ground that they had not made a valid contract for its purchase, but upon the sole ground that it was not such jute as they had the right to demand under their contract. Upon all these facts it seems to us quite clear that there was evidence sufficient to authorize the inference by the jury that they had received the broker's note sent to them, and thereby considered themselves under a valid contract. The judge presiding at the trial therefore erred in nonsuiting the plaintiffs.

The plaintiffs also claim that there was evidence tending to show such a delivery and acceptance of the jute, or a portion of it, as to satisfy the statute of frauds; but we have not considered this claim, and make no determination now as to it.

For the error mentioned, the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except FOLGER, Ch. J., who being in doubt did not vote; RAPALLO, J., absent.

Judgment reversed.

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DAVID PRATT et al., Executors, etc., Appellants, v. EDGAR  
MUNSON et al., Respondents.

The provision of the act of 1858 in reference to the foreclosure of railroad mortgages (§ 2, chap. 502, Laws of 1858), which provides that a stockholder of a railroad company may, within six months after a sale of its road under foreclosure, on paying to the purchaser a proportion of the price paid equal to the proportion his stock bears to the whole stock of the company, have the same relative amount of stock or interest in the company, its road, franchises and other property, etc., was repealed by the act of 1854, amending the general railroad act (Chap. 282, Laws of 1854), and by the act of 1874 (Chap. 430, Laws of 1874), "to facilitate the reorganization of railroads sold under mortgages," etc.

(Argued March 10, 1881; decided March 22, 1881.)

## Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made April 22, 1880, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial, at Special Term.

The nature of the action and the material facts are stated in the opinion.

*Daniel Pratt* for appellants. The act of 1853, chap. 502, was constitutional. (*Bk. of Chenango v. Brown*, 26 N. Y. 447; *Berley v. Rampacher*, 5 Duer, 183; *Calkins v. Calkins*, 3 Barb. 305.) The obligation of an existing contract cannot be meddled with, but the remedy to enforce it is always a matter of regulation. (*Ogden v. Sanders*, 12 Wheat. 213; *Danks v. Quackenbush*, 1 Com. 129; *Moss v. Goold*, 11 N. Y. 281; *Becker v. Becker*, 27 Barb. 497.) Statutes must be construed prospectively unless there be express words giving them a retrospective application. (*Jackson v. Sprague*, 12 Johns. 169; *Harkley v. Sprague*, 10 Wend. 114; *Palmer v. Conley*, 4 Den. 374; 2 Com. 182.) The act of 1853 has never been repealed. (*McCarter v. Orphan Asylum Soc.*, 9 Cow. 437; *Bowen v. Lease*, 5 Hill, 221.) All statutes in *pari materia* are to be taken together as if they were one law. (Smith's Com. 647; *People v. Utica Ins. Co.*, 15 Johns. 358; 1 Doug. 36; *Rogers v. Bradshaw*, 20 Johns. 735, 743.) In any statute in regard to railroads, or in regard to any other incorporation where the words "capital stock" or "the whole capital stock" are used, they refer to the capital stock fixed by the charter or the articles of organization. (Laws of 1850, chap. 40; 2 R. S. [6th ed.] 516; 2 R. S. [Banks' ed.] 499; 1 R. S. [6th ed.] 931; 2 R. S. [5th ed.] 534, §§ 45, 47.)

*B. W. Huntington* for respondents. The act of 1853, chapter 502, has been repealed by subsequent repugnant legislation, and is obsolete. (Chap. 282, Laws of 1854; 3 Edm. 610; chap. 444, Laws of 1857; 3 Edm. 650; *Seymour v. Canandaigua, etc.*, 25 Barb. 300; *Coe v. Pennock*, 8 Am.

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L. Reg. 27; 2 Redf. & B. R'way Cases, 667; chap. 430, Laws of 1874; chap. 446, Laws of 1876; 1 Kent, 464; *Stief v. Hart*, 1 N. Y. 20; *Howland v. Meyer*, 3 id. 290; *Wood v. Wellington*, 17 id. 297; *Com'rs Knox Co. v. McComb*, 19 Ohio [N. S.], 320, 341.)

DANFORTH, J. Prior to the 1st day of March, 1873, "The Sodus Bay and Corning Railroad Company" was organized under the laws of this State, and on that day executed to the defendants, "The Farmers' Loan and Trust Company," a mortgage upon all its property and franchises for the purpose of securing the payment of certain bonds by it executed and in the mortgage described. Upon default made, an action of foreclosure of the mortgage was commenced and prosecuted to judgment. The mortgaged property was sold under it on the 23d day of June, 1876, to the defendant, Munson, and after confirmation by the court was conveyed to him. The plaintiffs held one share of the capital stock of said company, of the par value of \$100, and having, as they claim, complied with the provisions of section 2 of chapter 502 of the Laws of 1853, entitled "An act to authorize stockholders of railroad and plankroad companies to make payments upon mortgages in process of foreclosure against such companies, and thereupon to become interested in said mortgages," brought this suit to enforce a cause of action alleged to have accrued to them by reason of the defendants' refusal to accede to their demands.

The purpose of the first section of this act is very well explained by the title, but the plaintiffs have no concern with that, for, as we have already seen, before they sought the benefit of the act the mortgage was extinguished and title acquired by Munson as purchaser. The second section declares in substance that any stockholder of such company shall, on paying within six months after the sale under such foreclosure, to the purchaser thereunder a sum equal to such proportion of the price paid by him as such stockholder's stock shall bear to the whole capital stock of said company, "be entitled to have the same relative amount of stock or interest in said rail-

road company and its road, franchises and other property." The object of these provisions was doubtless to enable each stockholder to continue his interest in the corporate property, by contributing to the purchaser a certain proportion of the sum paid, and so becoming with him tenants in common of the estate. The directions of the section are very inadequate, and could hardly afford to any one indemnity for the loss sustained by the extinction of the corporation of which he had been a member. It was probably the result of afterthought, and added to the first section by amendment. Although it speaks of stock or interest, there could be, after foreclosure and sale, no right of property to be so represented, and the one contributing under its permission would become part owner or partner with the purchaser; a relation which, formed under such circumstances, could hardly be profitable or productive of any good result to either. But in 1854 (Laws of 1854, chap. 282) a law was passed amending the general railroad act of 1850 (Laws of 1850; chap. 140), by declaring that whenever the purchaser of the real estate, track and fixtures of any railroad corporation which had theretofore been sold, or might be thereafter sold, by virtue of any mortgage executed by such corporation, shall acquire title to the same in the manner prescribed by law, such purchaser may associate with him any number of persons, and make and file articles of association, as prescribed by the act of 1850 (chap. 140), and such "purchaser or purchasers and their associates shall thereupon be a corporation, with all the powers, privileges and franchises, and be subject to all the provisions of this act." If we were to go no further, it would seem that this statute was entirely repugnant to that of 1853. Under it the purchaser may select his own associates, and without delay form a corporation, prescribe its capital, and by its directors open books for subscriptions thereto, exact payment of ten per cent in money at the time of subscribing, and require the residue to be paid "in such manner and in such installments as they may deem proper." (Laws of 1850, chap. 140, §§ 4, 7.) By the act of 1853 a period of six months must intervene within which the purchaser could in no way sell or dispose of

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the property, lest he should be unprepared to convey to some stockholder in the old company a proportion thereof, nor could he use or enjoy the property except at the risk of being called to account by the same person. By the act of 1853 he must keep the property on hand. By the act of 1854 he may, by new arrangements, convey the title to a new corporation and convert the property into stock. But if the act of 1853 indicated the policy of the legislature toward the stockholder, a still greater change is manifest by the act of 1874 (Laws of 1874, chap. 430), designed, as its title says, "to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases." The first section is substantially like the amendment of 1854 already considered, and declares that the "new company" formed by the purchaser and his associates shall become and be a body politic and corporate, and be vested with all the rights, privileges and franchises, "which at the time of such sale belonged to or were vested in the corporation formerly owning the property so sold." Now this act cannot be construed so as to be consistent with the continuance of the right claimed under section 2 of the act of 1853. The prayer of the complaint is the interpretation put upon it by the plaintiffs, and if the act is in force, is the correct interpretation. They ask that "they be adjudged the owners of and vested with the title in one fifteenth-thousandth part of said property and franchises so purchased by the said Edgar Munson upon the said foreclosure sale, and that he be directed to convey to them that interest by a sufficient deed of conveyance." Then follows the description of all the property of the old company, as that in which they claim a right to have an interest. Under the act of 1874, this very property, and all of it as it was at the time of the sale, is for the new company. Under the act of 1853 it is liable to be carved up and transferred in undivided parts to every one of the old stockholders who may comply with the terms of that act. They are, I think, contrary to the enactment of 1874, and, therefore, by necessary implication repealed by it. This conclusion is strengthened by subsequent



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provisions of the same law (1874, *supra*). The second and following sections declare that when the person organizing the new corporation shall have acquired title to the property upon such sale, pursuant to any plan or agreement for the readjustment of the interests therein of (among others) the stockholders of the company, "the property and franchises whereof have been sold," every such stockholder shall have the right to assent to the plan of readjustment, "at any time within six months after the organization of such new company, and by complying with the terms and conditions of such plan become entitled to his *pro rata* benefits therein, according to its terms." These affirmative provisions, as well as those above referred to in the acts of 1854 and 1874, clearly "import a negative" to the terms of the earlier act of 1853, on which alone the plaintiffs rely. They cannot coexist with the later acts, for if carried into effect they would be productive not merely of inconvenience, but prevent the operation of those acts. The right of the purchaser, as declared therein (Laws of 1854, 1874, *supra*) to the unrestrained control of the whole property, by transferring it at once to a corporation formed for its management, is absolute and unconditional. It might be exercised on the day of the foreclosure sale, and whensoever exercised, it ceases to be his property or under his control. It becomes at once the property of the new corporation and under its control. Nothing could be more repugnant to or inconsistent with the right given to a stockholder in the old company by the act of 1853 (*supra*). That right is not, as the appellants claim, "to have stock in the new company" in any proportion. The statute of 1853 does not contemplate the formation of a new company. No obligation is imposed upon the purchaser to form or assist in forming one. No provision is made for it. Upon the foreclosure sale the purchaser takes the property to do with as he chooses, as he might deal with land or chattels, subject only to the right given to the stockholder by section 2 of the act of 1853 (*supra*) to participate in the purchase upon the terms and within the time therein mentioned. That right

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must be deemed taken away by the power of disposition conferred upon the purchaser by the above acts; for the liability to convey to the stockholders of the company an interest in the property purchased cannot coexist with the power to convert the whole for other purposes and to other parties. Again the act of 1874 (*supra*) secures to the stockholder in the old company a right to participate in the benefits of reorganization in one event only — when the title is acquired to the railroad property and franchises pursuant to some plan or agreement for the readjustment of the respective interests therein of mortgage creditors and stockholders in the old company. This provision also is inconsistent with the right embraced in the second section of the act of 1853 (*supra*). It seems to us that these acts were intended by the legislature to prescribe the rule applicable to the stockholder in a railroad company and the purchaser upon foreclosure of its property and franchises; that they are repugnant to the provisions of the act of 1853 upon the same subject, and therefore repeal them, according to the maxim that “every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto.” (Bac. Abr., Stat. D.)

We think, therefore, the provisions of the act of 1853 (§ 2, chap. 502), on which the plaintiffs rely, were not in force at the time of the sale under the foreclosure, and that the plaintiffs acquired no cause of action against the defendants.

This conclusion renders it unnecessary to consider the other questions argued, and requires that the judgment appealed from should be affirmed.

All concur, except RAPALLO, J., absent, and FINCH, J., not voting; FOLGER, Ch. J., concurs in result.

Judgment affirmed.

## Statement of case.

JOHN F. SMYTH, as Superintendent, etc., Respondent, v. THE KNICKERBOCKER LIFE INSURANCE COMPANY, Impleaded, etc., Appellant.

H. executed a bond and mortgage to a life insurance company by whom it was assigned to the superintendent of the insurance department. The assignment was accompanied by, and was accepted by the superintendent upon the faith of a writing signed by H., consenting to the assignment, and certifying that the amount secured by the mortgage was unpaid, and that there was "no off-set to or legal or equitable defense against the same." The assignment was duly recorded. Subsequently H. sold and conveyed the premises covered by the mortgage to N., who conveyed a portion thereof to McC. About the time of the conveyance to McC. the insurance company executed and delivered to N., he having no knowledge of the assignment, a release of that portion of the mortgaged premises conveyed to McC. Defendant, the K. L. I. Co., in reliance upon the release, made a loan to McC., secured by mortgage on the premises so conveyed to her. In an action to foreclose the mortgage executed to the superintendent, the K. L. I. Co. set up and offered to prove an oral agreement between H. and his mortgagee at the time his mortgage was executed, that upon the completion of a dwelling-house then being erected on the mortgaged premises that portion conveyed to McC., should be released, and that the release was executed in pursuance thereof. This was objected to and excluded. *Held*, no error; that the release was void, as the record of the assignment was constructive notice to subsequent purchasers of the mortgaged premises; and that H. and those deriving title under him were estopped from proving the agreement.

(Argued March 10, 1881; decided March 22, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 10, 1880, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 21 Hun, 240.)

This action was brought by plaintiff, as superintendent of the insurance department of the State of New York, to foreclose a mortgage executed by defendant Hall and wife, to the Mutual Protection Life Assurance Society, on June 29, 1871. The mortgage and accompanying bond were assigned in October 1871, to the then superintendent of said department to be held by him under the insurance act, as security for the policy-hold-

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ers of the mortgagee. The securities were accepted by said superintendent upon the faith of a written instrument executed by the mortgagor wherein he consented to the assignment and certified and agreed as follows: "That there is now unpaid and due or to become due on said bond and mortgage the principal sum of \$9,000, with interest thereon from June 29, 1871, and that there is no off-set to or legal or equitable defense against the same."

The further material facts appear in the opinion.

*Henry W. Johnson* for appellant. The record of an assignment of a mortgage is constructive notice only to subsequent purchasers of the same mortgage. (*Campbell v. Vedder*, 3 Keyes, 178; *Purdy v. Huntington*, 42 N. Y. 348; *Trustees of Union College v. Wheeler*, 61 id. 88; *Greene v. Warwick*, 64 id. 227; *Crane v. Turner*, 67 id. 440; *Bryan v. Judson*, 10 Wk'ly Dig. 515; 22 Alb. L. J. 295.) The law imposes no obligation, therefore, upon any one except purchasers of a mortgage to examine the records to ascertain whether it has been already assigned. (*James v. Morey*, 2 Cow. 296; *Reed v. Marble*, 10 Paige, 413; *New York Life Ins. and Trust Co. v. Smith*, 2 Barb. Ch. 84; *Washburn v. Burnham*, 63 N. Y. 135; *Wade on the Law of Notice*, 61.) The fact that a portion of a contract has been reduced to writing shall not preclude evidence of the entire contract, of which the written instrument is only a part. (*Hope v. Balen*, 58 N. Y. 380; *Hutchins v. Hibbard*, 34 id. 24; *Hope v. Smith*, 35 N. Y. Super. Ct. 458; *Unger v. Jacobs*, 7 Hun, 220; *Drew v. Buck*, 12 Hun, 267; 1 Greenl. Ev., §§ 284, 304; *Lewis v. Seabury*, 74 N. Y. 409; *Van Brunt v. Day*, 8 Abb. N. C. 336.) The certificate made by Hall, the original mortgagor, at the time of the assignment to the respondent did not estop defendant. (*Crane v. Wheeler*, 67 N. Y. 440; *Westbrook v. Gleason*, 79 id. 30.)

*M. D. Grover* for respondent. The referee properly excluded evidence of the verbal agreement made at the time of executing the bond and mortgage mentioned in the complaint, that

the mortgage therein named should release a portion of the mortgaged premises when certain buildings were erected, etc., and that the consideration of the release mentioned was the completion of said buildings. (*Austin v. Sawyer*, 9 Cow. 39; *Sinclair v. Jackson*, 8 id. 543; *Stevens v. Cooper*, 1 Johns. Ch. 425; 8 Johns. 192; 18 id. 45; 5 Cow. 173; 12 Wend. 61; 1 Sandf. Ch. 34; *Hope v. Babylon*, 58 N. Y. 380; *Hutchens v. Hubbard*, 34 id. 24; *Unger v. Jacobs*, 7 Hun, 220; *Cox v. Barker*, 49 N. Y. 107; 4 Hill, 643; *Halliday v. Hart*, 30 id. 474; *Chamberlain v. Bradley*, 101 Mass. 188; *Younge v. Gilbeau*, 3 Wall. 636.) The finding of the referee, that such release did not cut off or in any way impair the lien of the mortgage mentioned in the complaint, is correct. (*Mut. L. Ins. Co. v. Wilcox*, 55 How. 43; *St. John v. Spaulding*, 1 T. & C. 483; *Belden v. Meeker*, 2 Lans. 470, 474; 47 N. Y. 308, 312; *Van Derkemp v. Shelton*, 11 Paige, 29.) The insurance department having taken the mortgage and relied upon Hall's representation, and countersigned registered policies on the faith of the deposit, and the Mutual Reserve Life Insurance Company having become insolvent, Hall was estopped from claiming any thing under said agreement, and defendant, claiming from or under Hall, can have no higher or other equities than he had. (*Smyth v. Lombardo*, 15 Hun, 476; *First Nat. Bank of Corry v. Stiles*, 22 id. 340.) The rule, that an assignee of a mortgage takes it subject to the latent equities in favor of an assignor, relates only to those equities which are not without the scope of the recording act, and against which subsequent purchasers in good faith are protected. (*Green v. Warnick*, 67 N. Y. 220, 227; *Union College v. Wheeler*, 61 id. 88.)

MILLER, J. This case involves a question as to the priority of mortgages as liens upon mortgaged premises, which has been the subject of frequent consideration in this court, and in some very late decisions. The plaintiff's mortgage, which is the subject of foreclosure in this action, was assigned by the mortgagee to the superintendent of the insurance department

and attached to the assignment. The mortgagor, one Hall, by an instrument in writing, consented to the transfer, and did thereby certify and agree that the principal and interest were due upon the mortgage, and that there was no off-set or equitable defense against the same, and these papers with the bond and mortgage were delivered to the superintendent of insurance, and accepted by him upon the faith of the statements of the mortgagor, and in reliance upon their truth. The assignment was duly recorded. The mortgaged premises were afterward conveyed by the mortgagor who executed the mortgage now held by the plaintiff, to one North, and a portion thereof was conveyed by North and wife to one Agnes McCord, who executed to defendant, the Knickerbocker Life Insurance Company, a mortgage upon the same. At or about the time of the conveyance to McCord the plaintiff's assignor executed and delivered to North, who had no knowledge of the assignment of the mortgage to the plaintiff, a release from the operation of the lien of the mortgage executed by Hall of the portion of the premises conveyed by North and wife to Agnes McCord, and the defendant in reliance upon the release paid over to the mortgagor the sum agreed to be lent to her.

It was set up as a defense to the action that there was no agreement between the mortgagor and the mortgagee, at the time of the execution of the bond and mortgage mentioned in the complaint; that upon the completion of the erection of a dwelling-house then in progress that portion of the mortgaged premises covered by the defendant's mortgage should be released, and that the assignor of the mortgage held by the plaintiff did release the same from the lien of the mortgage; and various offers of evidence were made to establish such defense, which were excluded by the court and exceptions duly taken to the rulings.

The controversy in this action must be determined upon the effect to be given to the recording of the assignment of the mortgage to the plaintiff under the circumstances narrated. The court upon the trial found as a conclusion of law, that the release was void and of no effect and did not release or discharge or in any way affect or impair the lien of the plaintiff's

mortgage on the premises covered by the mortgage to the defendant. It also found that the lien of the plaintiff's mortgage was prior to the lien of the mortgage to the defendant as to that part which is covered by the mortgage executed and delivered to the defendant.

This result, we think, is fully sustained by the facts presented, and is supported by authority. The appellant claims that the record of an assignment of a mortgage is constructive notice only to a subsequent purchaser of the same mortgage; that as to purchasers of the mortgaged premises no presumption is to be indulged that if the assignment is recorded they have become apprised of the fact, and that not being bound to examine the records, the law will not presume that they have examined them; and numerous authorities are cited to support the doctrine contended for. While it is no doubt true that there are *dicta* in some of the reported decisions which tend to uphold the position contended for, in the development and progress of the law as to this class of questions, the more recent decisions do not uphold such a rule in the broad and comprehensive sense which is claimed. We do not deem it necessary to examine in detail the authorities cited and relied upon by the defendant's counsel, and it is sufficient to say that the very latest adjudication of this court settles the question now presented, beyond any controversy. In the case of *Decker v. Boice*, decided by this court December 14, 1880,\* the authorities are reviewed and considered, and a conclusion arrived at which is adverse to the claim of the appellant's counsel, under a state of facts of a similar character to those here presented. It appeared in the case cited that four mortgages were executed upon the purchase by the mortgagor from the several mortgagees of their interest in certain lands therein described. Two of these mortgages were assigned, and the mortgages and the several assignments thereof were placed on record, and upon a statutory foreclosure sale under the same, the plaintiff acquired title and brought an action for a parti-

tion of the lands. The other two mortgages were not assigned or placed on record. The controversy turned upon the effect to be given to the recording of the assignments of the mortgages, upon the foreclosure of which, the plaintiff purchased, and the court at Special Term held that the assignees were purchasers in good faith and for a valuable consideration, without notice of the mortgages held by the defendants.

It was also held that the four mortgagees being executed at the same time, each mortgagee having notice of the other mortgages, and the mortgagees having mutually agreed that neither should have priority over the other, but that all should be equal liens on the premises, that no priority was acquired by the holders of the mortgages by having them first recorded, because each had notice, when the mortgages were executed, and being executed simultaneously the holders of the mortgages recorded were not subsequent purchasers, and the recording acts had no application as between them. Nor did the assignees acquire any priority from the fact that the assigned mortgages were recorded when they took the assignments, or because they had no notice, when they purchased, of the existence of the other mortgages. It decided also that the general rule, that the purchaser of a chose in action must abide the title of the person from whom he buys, and takes subject to the equities of the debtor and the latent equities of third persons, applies to the assignees of a mortgage, and they are affected by such equities, although they purchased without notice, and the fact that the mortgages are recorded does not aid them, for the reason that under the recording act an assignee of a recorded mortgage gets no preference over an unrecorded mortgage, when the mortgagee or assignee could not claim it in consequence of his having had notice or by reason of any other equity; but that under the recording act an assignee of a mortgage is by the express terms of the recording act a purchaser, and both the mortgage and the assignment, if in writing, are conveyances within the act. The authorities bearing upon the question are considered and discussed, and it is said by ANDREWS, J., that the declaration



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Opinion of the Court, per MILLER, J.

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in 1 Revised Statutes, 756, § 1, "that an unrecorded conveyance shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, when the conveyance shall be first recorded, includes in the term purchaser an assignee of a mortgage, and makes the assignment a conveyance of the same real estate, or a portion thereof, included in the unrecorded instrument;" and it is laid down, that "under the recording act an assignee of a mortgage may, as against a prior unrecorded mortgage, acquire a better right than was possessed by his assignor," and the right of the assignee to priority over the unrecorded mortgages was upheld. It will be seen that the equities in the case cited were similar to those existing in the case at bar, as in both cases the assignee had no notice of such equities, and the same principle is invoked. The case cited is directly in point, and decisive upon the question considered, without looking at numerous other authorities which are relied upon by the defendant's counsel. This is the fact, even if it be assumed that there was an agreement at the time of the execution of the bond and mortgage that a portion of the premises should be released, as set up in the answer and as was offered to be proved upon the trial, as such agreement could not affect the rights of the parties under the recording act. If the conclusion arrived at is correct, then the various offers of evidence made by defendant's counsel to establish the agreement set up in the answer were immaterial, and if proved would not affect the plaintiff's claim.

It also follows that there was no error either in the conclusions arrived at by the referee or in any of the rulings upon the trial, and the judgment should be affirmed.

All concur, except RAPALLO, J., absent, and FINCH, J., not voting.

Judgment affirmed.

## Statement of case.

In the Matter of the Petition of BENJAMIN W. MERRIAM to vacate an assessment.

The intent of the provision of the New York city charter of 1873 (§ 91, chap. 385, Laws of 1873), requiring contracts for work and supplies to be founded on sealed proposals and given to the lowest bidders was to require a submission for competition of every important item of a contemplated work.

Where in the advertisement for proposals for constructing a sewer a price was fixed for rock excavation which constituted a large portion of the work, *held*, that this was a violation of the charter, and that an assessment for the work was so far void.

But *held* that such error furnished no ground for vacating the whole assessment; that a case was presented for a deduction of the objectionable item as authorized by the act of 1870 (§ 27, chap. 888, Laws of 1870).

The provision of said act of 1870, allowing the modification of assessments by making such deductions was not repealed by the act of 1874 (Chap. 312, Laws of 1874), in relation to taxes and assessments in said city.

The advertisement and the contract required the purchase by the contractor from the city of sewer and culvert pipe at specified prices; said pipe had been purchased by the city under contract let at a public bidding and was furnished by the city at the contract-price. *Held*, that this provision was proper and lawful.

*It seems* that surveyors' fees are properly included as an item of expense of such a work.

By the contract the right was reserved to the commissioner of public works to increase or diminish the gross length of the sewers, culverts and drains, the number of basins or piles or the amount of foundation plank, or any other item. *Held*, that in the absence of proof of fraud, this did not impair the validity of the contract.

The onus of establishing a substantial error in an assessment devolves upon the party making objection thereto and must be proved by affirmative evidence.

Accordingly *held*, that an objection that the entire cost of the work was assessed when no more than one-half thereof was assessable upon adjacent property under the act of 1865 (§ 8, chap. 565, Laws of 1865), could not be entertained in the absence of proof of what was the entire cost of the work; that it could not be presumed, in the absence of evidence to establish it, that more than one-half of the expense was assessed.

*It seems* that said act of 1865 has reference to the laying out of streets, not to the construction of sewers.

Also *held*, that an objection that the assessment was illegal because made up and notice published by three of the assessors, not by the full board, was not tenable in the absence of proof that all four were not present

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or that the fourth did not have notice of the meeting, or that a vacancy, which had been occasioned by the death of one of the assessors, had been filled at the time of the assessment.

So, also *held*, that proof that a member of the board of revision was absent did not sustain the objection that the assessment was not legally confirmed.

(Argued December 14, 1881; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made June 11, 1880, affirming an order of Special Term vacating an assessment upon lands of the petitioner for sewers in Boulevard and other streets in the city of New York.

The objections raised and the facts pertinent thereto appear in the opinion.

*William C. Whitney and Roscoe Conkling* for appellant. The effect of stating in the proposals certain prices for certain items is not to destroy competition, even as to those items, but simply to transfer it to those items which are directly submitted to competition. (*Matter of the N. Y. Protestant Epis. School*, 75 N. Y. 324, 327.) The court has power to reduce instead of vacating an assessment where justice is satisfied by a reduction. (Chap. 383, § 27, Laws of 1870; *Matter of McCormack*, 10 Abb. Pr. [N. S.] 234; *Matter of O'Hare*, 5 Hun, 287; *Matter of Rae*, id. 455; *Matter of The Hebrew Asylum*, 10 id. 112; *Matter of Treacey*, 59 Barb. 525; *Matter of Eager*, 46 N. Y. 100; *Matter of St. Joseph's Asylum*, 69 id. 353; *Matter of Cram*, id. 460; *Matter of Hebrew Benevolent Orphan Asylum*, 70 id. 476; *Matter of N. Y. Prot. E. P. School*, 75 id. 324; *Auchmuty's Case*, 18 Hun, 326; *Matter of Walter*, 75 N. Y. 354; *Matter of Schell*, 76 id. 432; *Matter of Lord*, 78 id. 109.) There is no ground for the claim that the act of 1870, allowing the modification of assessments, in place of wholly vacating them, has been repealed by chapter 312 of the Laws of 1874. (*Matter of Rae*, 5 Hun, 456; *Matter of Mead*, 74 N. Y. 216-221; 13 Hun, 349.) The burden is on the petitioner to convince the court that a repeal was in-

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tended ; a repeal by implication never being favored by the courts. (*McNeely v. Woodruff*, 1 Green, 352, 356 ; *Williams v. Pritchard*, 4 T. R. 2 ; *People ex rel. Kingland v. Palmer*, 52 N. Y. 83 ; *Matter of Commissioners Central Park*, 50 id. 493 ; *Matter of Evergreens*, 47 id. 216.) The intention of the act of 1874 was to substitute "substantial error" in place of "legal irregularity" as the ground of relief ; not to declare that vacation and not modification should be adjudged when such ground should be made out. (*Matter of Cram*, 69 N. Y. 452, 459.) A subsequent statute effects a repeal, only so far as it is clearly and indisputably contradictory and contrary to the former act in the very matter, and where the repugnancy is such that the two acts cannot be reconciled. (*Foster's Case*, 11 Rep. 59 ; *Moore v. Mausert*, 5 Lana. 175 ; *Ely v. Holton*, 15 N. Y. 598.) All the defects alleged against the assessment in question fall within the enumeration contained in the seventh section of chapter 580 of the Laws of 1872, as well as within the same section, as amended by chapter 313 of the Laws of 1874. If any one of them, therefore, should be deemed to exist it cannot be urged in this proceeding as a ground for vacating the assessment. (*Matter of Ferdinand Mayer*, 50 N. Y. 505 ; *Matter of Prot. Epis. Pub. School*, 75 id. 324 ; *Matter of Pet. of Ind. Sav. Bank*, id. 388, 395.) The legislature has power to ratify an invalid municipal contract. (*Brown v. The Mayor, etc.*, 63 N. Y. 239 ; *People v. The Supervisors of Ulster*, 34 id. 268 ; *Matter of Petition of Em. Ind. Sav. B'k*, 75 id. 388, 394.) The errors alleged did not constitute "substantial errors," so as to be grounds for vacation under the act of 1858, as amended by the act, chap. 312, Laws of 1874. (*Matter of Prot. E. P. School*, 75 N. Y. 325 ; *Matter of Second Ave. Meth. E. Church*, 66 id. 400 ; *Matter of Em. Ind. Sav. B'k*, 75 id. 389 ; *Morewood v. Corporation of New York*, 6 How. Pr. 389.) The burden of establishing affirmatively that this assessment was made, and notice of the making thereof, given by an incomplete board of assessors rested upon the petitioner. (*Matter of Hebrew B. O. A. Soc.*, 70 N. Y. 476, 479 ; 2 R. S. 555,

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§ 27; *Doughty v. Hope*, 3 Den., 594; *S. C.*, id. 249; *Downing v. Rugar*, 21 Wend. 178; Dill. on Mun. Corp. § 221; *Ex parte Rogers*, 7 Cow. 526.) If the act of making the assessment and giving the notice thereof were those of three assessors only, they were valid and sufficient. (Laws of 1859, chap. 302, p. 683; *Downing v. Rugar*, 21 Wend. 182; *Coleman v. Shattuck*, 5 T. & C. 34, 40, 41; 62 N. Y. 348, 360; *People ex rel. Henry v. Nostrand*, 46 id. 375, 383; *People v. Mayor, etc., of Syracuse*, 63 id. 291, 293; *People v. Palmer*, 52 id. 83; *Attorney-General v. Davy*, 2 Atkyns, 21.) Three assessors have power to act alone where there is an unfilled vacancy in the board caused by the death or resignation or removal of the fourth. (1 Edm. 321, § 34; Laws 1851, chap. 176, § 8; *Gildersleeve v. Board of Education*, 17 Abb. Pr. 201-211.) This is equally true with respect to the board of revision. (Laws 1873, chap. 335, § 89; *Downing v. Rugar*, 21 Wend. 178; *Sargent v. Webster*, 13 Metc. 497; *Lane v. Brainerd*, 30 Conn. 565; *Doughty v. Hope*, 3 Den. 598.) The expense of surveyor's fees was properly included in the assessment. (*Matter of Babcock*, 23 How. 119; *Matter of Tappan*, 54 Barb. 225; *Matter of Eager*, 46 N. Y. 100.)

*James A. Deering* for respondent. The work was not contracted for and let to the lowest bidder as required by the city charter and ordinances, because the items of rock excavation, foundation plank and sewer pipe were not submitted to competition, but a price arbitrarily fixed therefor by the commissioner of public works. (Laws of 1873, chap. 335, § 91; Revised Ordinances, chap. 8; Laws of 1865, chap. 381; *Matter of Mahan*, Ct. of App., April, 1880; *Matter of Manhattan Sav. Institution*, Sept. 1880; *Curtis v. Leavitt*, 15 N. Y. 247; *Brady v. The Mayor*, 20 id. 312; *State v. Patterson*, 36 U. S. L., 7 Vroom, 159; Chap. 187 of the Laws of 1849, §§ 15, 21, 22; Chap. 383 of the Laws of 1849; The Revised Ordinances of the Common Council, 1859, arts. 5, 6, § 42; Laws of 1870, chap. 137, § 104; Laws of 1873, chap. 335; *People ex rel. Dinsmore v. Croton Bd.*, 6 Abb. Pr. 58; *People ex rel. Cum-*

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*ming's v. Croton Aq. Board*, 26 Barb. 240; *Smith v. The Mayor*, 10 N. Y. 508; *Green v. The Mayor*, 60 id. 303; *Matter of Em. Ind. Bk.*, 75 id. 388; *Appleby v. The Mayor*, 15 How. Pr. 428; *Bonesteel v. The Mayor*, 22 N. Y. 162; *Ellis v. The Mayor*, 1 Daly, ; *Matter of Newton*, 57 How. Pr. 500.) A usage which is a plain violation of law can hardly be claimed to be the proper guide for the interpretation of statutes. (*Van Loon v. Lyons*, 61 N. Y. 22-25; *Fellows v. Mayor*, 24 Sup. Ct. 249.) The fact that it would be difficult and expensive to obtain an accurate estimate of the amount of rock to be excavated before inviting proposals would not constitute a legal excuse for a failure to submit the rock excavation to competition. (*Smith v. Buffalo*, 1 Sheld. 493; *Brady v. The Mayor*, 20 N. Y. 312; *Matter of Eager*, 46 id. 100.) The option reserved by the commissioner of public works to increase or diminish the amount of work in the specifications or contract is fatal to the validity of the contract and the assessment. (*Wells v. Burnham*, 20 Wis. 112; *Kneeland v. Furlong*, id. 437.) The three assessors who made up the assessment and advertised it as complete and open for inspection did not constitute the board of assessors. (Laws of 1859, chap. 302; *People v. Nostram*, 46 N. Y. 375; *Doughty v. Hope*, 3 Den. 598; *Matter of Palmer*, 31 How. Pr. 42.) The action of the board of revision and correction of assessment lists, in confirming the assessment-list, did not cure or obviate this error. (*Doughty v. Hope*, 3 Den. 598; *Hassan v. Rochester*, 67 N. Y. 528; *Chapman v. Brooklyn*, 40 id. 372. The notice given by them of the completion of the list did not conform to the statute (Chap. 171, Laws of 1841). (Blackwell on Tax Titles, 118, 223; *Adriance v. McCafferty*, 2 Robt. 153.) The assessment was not legally confirmed. The action of the comptroller and corporation counsel, assuming to act as a board of revision and correction, was without authority of law. (*Matter of Tappan*, MS.; *Palmer's Case*, 1 Abb. N. S. 30.) It is a substantial error that there was included with the cost of the work the sum of \$6,747 for surveyor's fees. (*Matter of Roberts*, Sup. Ct., Gen. T., March, 1880.) The errors above specified in

the proceedings relative to the assessments are substantially within the act of 1874 (chap. 312), for which the assessment should be vacated entirely. (*Matter of Mahan*, Ct. of App., 1880; *Matter of Manhattan Sav. Inst.*, Ct. of App., Sept. 1880, MS.; *Matter of Prot. Ep. P. School*, 75 N. Y. 324; *Matter of Emigrant Ind. Sav. Bk.*, id. 388; *Matter of Second Ave. M. Church*, 66 id. 395; *Matter of Cram*, 69 id. 452; *Matter of Hebrew Asylum*, 70 id. 476; *Matter of Rhineland*, 68 id. 105; *Matter of Walter*, Ct. of Appeals, 75 id. 354; *Matter of Cheseborough*, 78 id. 232.)

MILLER, J. The principal objection urged against the validity of the assessment, which is the subject of review upon this appeal, is that the work was not contracted for and let to the lowest bidder as required by the charter and the ordinances of the common council of the city of New York — that is, that the items of rock excavation, foundation plank and sewer pipe were not submitted to competition, but a price was arbitrarily fixed therefor by the commissioner of public works. The charter of the city requires that contracts for work or supplies, except as provided, shall be made under such regulations as exist or shall be established by ordinances of the common council, and shall be founded on sealed proposals and given to the lowest bidder. (Session Laws of 1873, chap. 335, § 91.) The ordinance (chap. 8, art. 2) requires “that supplies and work shall be furnished by contract; that no contract shall be made until proposals are advertised for,” and that they “shall state the quantity and quality of the supplies or the nature and extent, as near as possible, of the work required” (§§ 15, 16, 17, tit. 2). The items which are the subject of complaint were rock excavations, which constituted a large portion of the work to be done, and the foundation plank, for each of which a price was fixed, and the sewer pipe, which it was required should be purchased and received of the commissioner of public works at prices stated.

The statute and ordinance passed in pursuance of the same were intended to establish a system by which work done for

and supplies furnished to the city should be the subject of competition and allotted to the lowest bidder for the same, and a substantial compliance with these requirements is essential to carry into effect the object of these regulations, which evidently were adopted to prevent a wasteful expenditure of the public money and to promote economy as well as practical convenience in the administration of the financial affairs of the city. The statute does not provide specifically as to the terms of the contract, and the ordinance only for quality and quantity as near as can reasonably be furnished. The appellant's counsel claims that all that is required is that the entire work as a unit should be submitted to competition, and when this is done in good faith the effect of stating in the proposal certain prices for certain items is not to destroy competition even as to them, but simply to transfer it to such items which are directly submitted to competition, and it is urged that such has been the uniform practice for many years and that in this case especially it would be exceedingly difficult to ascertain beforehand the quantity of rock excavation, which constitutes the largest item in the contract, so as to make an estimate sufficiently correct to carry out the purpose of letting the contract to the lowest bidder. These suggestions are not without force, and while there is strong ground for claiming that when the price fixed for one or more items is fair and reasonable and there is no evidence of fraud or extravagance, and the quantity could not be ascertained without a considerable expenditure of money, and that this could be done in some instances consistently with the interests of the public in view, and with the statute and ordinances we are, upon the whole, of the opinion that, to carry out the intention of the law to award contracts to the lowest bidder, it is requisite that the quantity of rock excavation, as near as possible, should be stated in the proposals, and that fixing the price for the same was in disregard of the law and a violation of the statute and the ordinance of the city which is cited. The question presented is not a new one and has been the subject of consideration in some of the decisions of this court of a very recent date.



*In the Matter of the Emigrant and Industrial Savings Bank* (75 N. Y. 388), an ordinance of the common council, adopted by a three-fourths vote for improving a street, directed that the work be done in such a manner as the commissioner of public works may deem expedient and for the best interests of the city and property-holders, and the work was done by day's work, without contract, it was held that the commissioner had no authority to cause the same to be done by day's work, as the improvement fell within the prohibition of section 91 of the charter of 1873, and the assessment was invalid. This decision sustains the general principle that all work where there is an aggregate expenditure of over \$1,000, with the exceptions provided for, must be awarded to the lowest bidder after advertisement, and does not directly involve the question whether a price can be fixed for any portion of the same.

*In the Matter of Mahan\** the distinct point was taken that the requirements of the statutes and ordinances were not complied with as the work included rock excavation for which a price was arbitrarily fixed by the commissioner of public works that was not submitted to public competition. The assessment was vacated by the Supreme Court upon this ground and this decision was affirmed in this court after a distinct presentation of the point, no opinion being written.

*In the Matter of the Manhattan Savings Institution*† decided September 21, 1880, the same question arose, and on appeal to this court we were asked to reconsider the case of Mahan upon the ground that the attention of the court had not been called to the case of *The People ex rel. Williams v. Dayton* (55 N. Y. 367). The decision of the Supreme Court was affirmed, the opinion citing the *Mahan Case* and holding that it must govern.

The principle decided in *Dayton's Case*, to wit, that the practical construction given to a statute by the legislature is entitled to a controlling weight in its interpretation, was also considered, and it was decided that it had no application where the construction was given by the party whose duty it was to

\* 81 N. Y. 621.

† 82 N. Y. 142.

obey the law. If these decisions are to stand they are decisive upon the question discussed and must be regarded as conclusive.

It is urged by the appellant's counsel that the *Mahan Case* was decided upon the authority of *Brady v. Mayor, etc., of New York* (20 N. Y. 312), and the *Manhattan Savings Institution* on the authority of the *Mahan Case*, and we are asked to reverse those recent decisions as not resting on sufficient authority and as not founded upon any sound principle. It is true that in the *Mahan Case*, the learned judge who wrote the opinion in the Supreme Court cites *Brady v. The Mayor* as an authority, but the decision was not put upon the latter case in the Supreme Court, nor was this the case upon the decision of the appeal in this court. If these adjudications depended upon the case of *Brady v. The Mayor*, they could not be upheld, as that case was not disposed of upon any such ground, as is clear by the later cases. There, bids were invited for grading and paving a street upon an estimate of the amount of work and materials required. This estimate did not include any rock excavation, although bids for such excavation, if any should be needed, were called for. The plaintiff bid \$25 a yard for rock excavation, which constituted most of the work actually performed, and this was manifestly extravagant and far beyond its real value. The contract was awarded to the plaintiff as the lowest bidder upon the other items without regard to the price bid for this item, and yet this price was inserted in the contract. As no quantity was named of rock excavation it could not be and was not considered in comparing plaintiff's bid with the other bids, and thus this part was entirely withdrawn from competition and the lowest bidder could not and was not ascertained, as there was in fact no lowest bidder for the whole work. Here no bid was requested for rock excavation, the price being fixed. The case cited, therefore, is not analogous. We are thus brought to the conclusion that *Brady v. The Mayor* is not an authority for the decision of the later cases which have been cited, and that they rest upon the ground

that the price fixed for rock excavation being fixed by the commissioner and being a material and important part of the work, it was withheld from competition in violation of the statute and the ordinance cited. It is not shown in this case that the price named was not a fair one or that any injury was inflicted upon the lot-owners by the naming of such price, but with the views entertained and which have been herein expressed the conclusion arrived at is that the intention of the law-makers was to enforce a submission of every important item for competition, naming the quantity so far as it could be reasonably ascertained. *In the Matter of The New York Protestant Episcopal School* (75 N. Y. 327), some remarks were made by CHURCH, Ch. J., which evidently tend in a direction adverse to the views expressed and are relied upon by the appellant's counsel. As, however, the distinct point now considered did not arise in that case, they are not sufficient to overrule the recent decisions of this court which have been examined. In view of the authorities which have been considered, we are of the opinion that the question discussed must be considered as *res adjudicata*.

While there was error in establishing a price for rock excavation in accordance with the foregoing views, we think it furnishes no ground for vacating the whole assessment, and a case is presented for a deduction of the objectionable item under the act of 1870 (chap. 383, § 27), which provided that "If upon the hearing of proceedings brought pursuant to the act known as chapter 388 of the Laws of 1858, entitled 'An act in relation to frauds in assessments for local improvements in the city of New York,' passed April 17, 1858, it shall appear that the alleged fraud or irregularity has been committed the assessment shall be vacated or modified as hereinafter provided. If upon such hearing it shall appear that by reason of any alleged irregularity the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum as is in the same proportion to such assessments as is the whole amount of such

unlawful increase to the whole amount of the expense of such local improvement." The section cited recognizes the doctrine that some part of an assessment may be sustained where irregularity or invalidity appears as to others, and when it can be ascertained, the portion which is sound and just may be upheld as unaffected by that which is invalid. It was intended, no doubt, to prevent assessments from being set aside for slight and trivial causes or mere irregularities or technical defects alone, and, while a deduction is authorized, it should only be to such an extent as is just and equitable, leaving the property benefited to bear the burden of that which was legal and valid and relieving it from the remainder. (*In re Mead*, 74 N. Y. 216.) A deduction of the amount to be paid for such excavation would do ample justice and subserve the objects of the law.

The right to make such deduction has been repeatedly recognized in the decisions of this court, and in numerous cases assessments have been reduced or a rehearing ordered, as the facts warranted. We do not deem it necessary to examine the authorities in detail on the subject, and a reference to them will disclose the application of the rule stated. (*In re Lord*, 78 N. Y. 109; *In re Schell*, 76 id. 432; *In re Walter*, 75 id. 354; *In re N. Y. P. E. Public School*, id. 324; *In re Hebrew B. O. Asylum*, 70 id. 476; *In re Cram*, 69 id. 460.) The act of 1870 (*supra*), allowing the modification of assessments instead of vacating them entirely has not been repealed by chapter 312 of the Laws of 1874, and the former act has been repeatedly recognized in some, if not all, of the cases last cited, and it has been regarded and assumed to be in full force.

In regard to the provision in the contract as to the purchase of sewer and culvert pipe from the city at specified prices, we think it was not liable to any valid objection. In carrying out a general system of sewerage in a large city it is very evident that the material of this kind of property should be of a uniform character, and, so long as it is purchased at a public bidding at reasonable prices and by contract, there can be no valid ground of complaint because the city furnished the

same at its own price. Such a system could not but operate advantageously to the city at large and the lot-owners and there was neither impropriety nor illegality in providing for the same as was done in this regard in contracts made for work. Such a provision requiring the contractor to take certain materials of the city is also sanctioned by law. (Laws of 1866, chap. 551, p. 1193.)

The objection that the expense of surveyors' fees was improperly included in the assessments is not stated in the petition and therefore is not now available. It is also, we think, without merit as no public work could be done properly without the aid of surveyors or engineers, and the expenses incurred for such services should be assessed upon the property which is to be affected and benefited thereby. (*In re Eager*, 46 N. Y. 100; *In re Tappan*, 54 Barb. 225.) The method of ascertaining the amount is not shown to have been unjust or unfair and we are unable to determine from the record that any wrong has been done thereby to any of the lot-owners or the public.

Some other objections are urged to the validity of the assessment which demand consideration. The reservation by the commissioner of the right to increase or diminish the gross length of the sewers, culverts and drains, the number of basins or piles, or the amount of foundation plank or any other item did not impair the validity of the contract. It did not withdraw any part of the work from competition or violate any municipal ordinance, and it is not apparent how it could materially affect the bidding for the work. But even if it can be supposed that such was the case, the advantage to be derived from the reservation would far exceed any injury which might have accrued. While, if done fraudulently, it might vitiate the contract, no reason exists why it should produce any such effect when inserted in good faith and no injury is apparent. The statute does not prohibit it, and therefore it is not to be assumed without proof that the commissioner did an act injurious to the city. If he did, or was actuated by a corrupt motive, it might

seriously affect the contract, even if he had a right to insert such a provision. It may also be remarked that in the construction of works of this description it frequently becomes necessary to make changes from the original plan which cannot be anticipated, and the reservation is a prudent exercise of care and vigilance under the circumstances of the case. The cases cited by the respondents' counsel from the Supreme Court of Wisconsin are not directly in point or controlling.

It is also insisted that it was unlawful to assess the entire cost of the work upon the adjacent property; that only one-half of the expense was assessable under section 8 of chapter 565 of the Laws of 1865, and that it was impossible to ascertain, from the engineer's return of the entire work, the precise cost of all the work. The act referred to appears to relate to the laying out of streets and not to the construction of sewers. (See §§ 1, 2, 3, 4 and 8.) But without regard to any other consideration, it is a sufficient answer to the objection that if more than half of the cost was unlawfully assessed it should have been proved, and it is not to be presumed without evidence to establish such a fact. The burden of proof is on the petitioner to show that the assessment exceeded one-half of the expense, and the city was not bound to show that it did not. (*In re Hebrew Benevolent Society*, 70 N. Y. 479.)

The point made that the three assessors who made up the assessment and published notice thereof did not constitute a complete board of assessors is not established as a matter of fact. The onus of establishing a substantial error devolves upon the party making the objection, and the petitioner must prove his allegations by affirmative evidence. (*In re Anderson*, 60 N. Y. 457; *In re Hebrew Ben. Society*, *supra*; *Astor v. The Mayor*, 62 N. Y. 576.) The proof here did not show positively that all four of the assessors were not present at a meeting when the notice was signed or that the fourth one did not have notice of such a meeting. The act of the three was valid if the vacancy occasioned by the death of one of them had remained unfilled when the assessment was made. If the vacancy had not been filled, then the remaining assessors, who

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were a majority, had express power to act. (Session Laws of 1859, chap. 302, § 16; *People ex rel. Howlett v. Mayor of Syracuse*, 63 N. Y. 291; *Colman v. Shattuck*, 62 id. 360.) The principle is well settled that where a body of officers are vested with authority to discharge public functions, death, absence, or the disability of one of them does not deprive the remainder of the power, provided there is left a sufficient number to confer together. (*Gildersleeve v. Board of Education*, 17 Abb. Pr. 206-211.)

We discover no objection to the form of the notice given by the assessors, and no such point was made in the petition.

The objection that the assessment was not legally confirmed is also without merit. A majority of the board of revision had authority to act by virtue of chapter 335, section 89, of the Laws of 1873. The same rule applies as to notice in the board of revision as it does with respect to the board of assessors. There was no proof that the recorder was not notified, and the proof of his absence did not establish that fact, as it is not distinctly shown that he was away at the time when the assessments were acted upon.

The learned counsel for the appellant insists that if any defect exists in the assessment it falls within the enumeration contained in the seventh section of chapter 580 of the Laws of 1872, as well as within the same section as amended by chapter 313 of the Laws of 1874, and therefore cannot be urged as a ground for vacating the assessment in this proceeding.

As we have arrived at the conclusion that, in accordance with the prior decisions of this court, the omission to submit the item of rock excavation to competition was an error of a substantial character, it is not required to discuss at length the effect of the various provisions of the statutes referred to. It is sufficient to remark that the acts cited have been the subject of consideration, and the interpretation placed upon them, we think, should be followed. It has been held that they were not intended to sanction or cure a total failure to comply with a mandatory law or ordinance, or a direct violation of its most important provisions. (*Matter of Em. Ind. Sav.*

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*Bank*, 75 N. Y. 388; *Matter of P. Epis. Pub. School*, id. 329.) According to the decisions last cited, the defect provided for is a "substantial error" within the meaning of the law, and, whatever criticisms might be indulged were the question an original one, we think that it must be regarded as *res adjudicata*. It may also be remarked that by chapter 554 of the Laws of 1880, "An act relating to certain assessments for local improvements in the city of New York," an ample remedy is provided for reviewing such proceedings and obtaining redress where any substantial error has been committed or substantial injustice has been done; and while this court will administer the law in such cases with a due regard to the rights of the parties and in accordance with well-settled principles, as another tribunal has full jurisdiction, appeals of this character should not be encouraged.

In view of the conclusion arrived at the order of the Special and of the General Terms must be affirmed as to the sewer pipe, and reversed as to the other items, and a new hearing ordered to ascertain the amount of deduction to be made as to such items, without costs to either party upon the appeal to this court.

All concur, except RAPALLO, J., absent; FOLGER, Ch. J., ANDREWS and EARL, JJ., concur in result.

Ordered accordingly.

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THE PEOPLE ex rel. HENRY SEARS, Appellant, v. THE BOARD OF ASSESSORS OF THE CITY OF BROOKLYN, Respondent.

The provision of the National Guard Act of 1870 (§ 253, chap. 80, Laws of 1870), entitling a member of the National Guard to an exemption from the assessed valuation of his property to the amount of \$1,000, during the period of his military service, was repealed by its omission from the section as amended in 1875 (§ 59, chap. 223, Laws of 1875).

No contract relation existed between the State and a member of the National Guard who had enlisted prior to the passage of the repealing act and whose term of service had not then expired, which would prevent



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it from taking effect as to him ; he enlisted subject to the right of the State at any time to modify or repeal the exemption, and upon the repeal his right to the exemption, as to all subsequent assessments, ceased.

(Argued March 15, 1881 ; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made July 18, 1879, affirming an order of Special Term, which denied a motion on the part of the relator for a writ of mandamus directed to the board of assessors of the city of Brooklyn, commanding them to deduct \$1,000 from the assessed valuation of the relator's property. (Reported below, 18 Hun, 386.)

The material facts are stated in the opinion.

*David E. Gwynne* for appellant. The exemption from taxation was in the nature of a contract between the citizen and the State, and being so, was protected by the inhibition in the Constitution of the United States which forbids the States to pass laws interfering with the obligations of contracts. (Fonblanque's Eq. C. 1, chap. 5, § 2 ; Chitty on Contracts, 28 ; *Piqua Bk. v. Knoop*, 16 How. Pr. 38 ; *Ex parte Goodin*, 18 Alb. L. J., No. 22 ; *Washington Un. v. Rouse*, 8 Wall. 430 ; *Fletcher v. Peck*, 6 Cranch, 87, 127, 131 ; *New Jersey v. Wilson*, 7 id. 164 ; *Thomson v. Holton*, 6 McLean, 387.) It was not the intention of the legislature by the act of 1875, to take away the exemption from taxation. (*United States v. Heth*, 3 Cranch [U. S.], 399 ; *United States v. Hopkins*, 22 How. 299 ; *Ely v. Holton*, 15 N. Y. 595.) Had the legislature intended to revive this tax upon the property of the militia, it should have stated the object to which it is to be applied and distinctly state the tax. (Constitution of State of New York ; 6 R. S. 89, §§ 20, 21 ; Art. 7, § 13, Const. N. Y. ; *Ex rel. Hopkins v. Board of Supervisors*, 52 N. Y. 556.)

*William C. De Witt* for respondent. Section 253 of the Military Code of 1870, under which the relator claims exemption, was, in so far as such exemption is concerned, repealed by

section 59 of the amendatory act passed in 1875. (1 Laws of 1870, p. 282; Laws of 1875, p. 213; *Moore v. Mausert et al.*, 49 N. Y. 332.) A statutory exemption from tax, or jury duty, consequent upon military services, is not in the nature of a contract or vested right of property protected by the Constitution from legislative molestation. (*People ex rel. Cunningham v. Roper*, 35 N. Y. 629.)

FINCH, J. The relator joined the National Guard of the State in the year 1874, while a statute was in force which provided that every commissioned officer, non-commissioned officer, musician and private belonging to that organization should be exempt from jury duty, and be entitled to a deduction from the assessed valuation of his real and personal property to the amount of one thousand dollars during the period of his military service. (Laws of 1870, ch. 80, § 253.) By a later act, passed during the relator's term of service, the act of 1870 was amended, and the section referred to changed, so as to reduce the period of future enlistments from seven years to five, but leaving existing enlistments to run for their full original term of seven years, and omitting entirely the tax exemption. Acting upon this amendment (Laws of 1875, chap. 223, § 59), the assessors of the city of Brooklyn refused to allow to the relator any reduction of assessed valuation on account of his performance of military duty for the years from 1875 to 1878, both inclusive, whereupon the relator applied for a writ of mandamus to compel them to allow his claims in this respect. The writ was refused and the propriety of such refusal is the sole question presented on this appeal.

That the effect of the amendment of 1875 was to repeal the exemption appears to be settled. (*Moore v. Mausert* 49 N. Y. 332.) It was there held in substance that an act which amends an existing statute "so as to read as follows," thereupon enacting a new and substituted provision, repeals all of the former statute omitted from the act as amended. That is the case here. The exemption given by the act of 1870 and omitted from the amendatory act was withdrawn and annulled and

ceased longer to exist. The exceptional privilege ceasing to be allowed left the general provisions of the tax laws to their normal and full operation upon the relator. We have reflected upon the reasoning by which the learned counsel for the appellant seeks to convince us that such a result was not intended by the amendment, but cannot concur in his construction of the act. It might have been just, and possibly wise, to have preserved the exemption to those whose enlistment preceded the change, and who were held for their full term of seven years, and limited the withdrawal of the exemption to the new recruits whose term of service was for the shorter period, but the legislature did not do it. They struck down and struck out the exemption entirely. It remained for nobody. It ceased wholly and entirely to have any existence, and became as if it had never been allowed. It is impossible to construe it back into the statute for any purpose, or to benefit anybody.

The further argument that the five years men are exempted from the performance of jury duty, but no such exemption is expressly given to the seven years men, and, therefore, we must presume, as to them, that the old statute remained in force, is founded upon a misconception of the act. As amended, it in terms provides that all members of the National Guard, entirely irrespective of their terms of service, shall be exempt from jury duty during the time that they shall perform military service. It then adds the further provision, applicable both to the seven years and the five years men, that every person who shall have *served* five years and been honorably discharged shall, forever after, be exempt from jury duty. It is the actual service for five years, not the period of enlistment, which gives the right. We can see no valid reason for hesitating to follow the rule of construction heretofore adopted, which determines that the amendatory act repealed the exemption.

The appellant's further claim, that the right of the relator, under the law as it existed at the date of his enlistment, was a contract between him and the State, which could not be annulled without a violation of the Federal Constitution, has also been ruled adversely. (*People ex rel. Cunningham v. Roper*,

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35 N. Y. 629.) The grounds of that decision were so fully stated and its propriety so thoroughly vindicated in the case cited as to make further discussion superfluous. It went upon the ground that the services of the relator in the militia were such as the State might have commanded; that no contract relation was established; that the members of the National Guard joined its ranks subject to the right of the State at any time to modify or repeal the exemption; and that its allowance was merely an act of general legislation subject at any time to be reversed or changed when the welfare of the people seemed to require such action. We see no just reason to question the correctness of the decision, and deem it applicable to and decisive of the present case.

Nor do we see any basis for the contention that the taxes of 1875 and 1876 should have been allowed in any event. No such question was presented to the assessors or to the Special Term in the moving affidavits. That the taxes for 1875 had been "settled upon" before the passage of the amendatory act, did not alter the duty of the assessors in making their assessment. When they acted the exemption was gone, and they had no other duty to do than obey the law then in force.

Some other questions were raised on the appeal but not such as to require discussion.

The order of the General Term should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Order affirmed.

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CHARLES W. BLOSSOM et al., Appellants, v. LLEWELLYN G.  
ESTES, Respondent.

The right to an attachment having been conferred by statute is limited by its provisions.

Under the provisions of the Code of Procedure (§ 227),\* as amended by section 6, chapter 723, Laws of 1866, declaring that for the purposes of an

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\* See section 633, Code of Civil Procedure.

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attachment an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and, upon omission so to do, the jurisdiction which attached on granting the warrant ceased.

An attachment rendered void by failure to serve or publish summons within the time specified was not revived and validated by the appearance of the defendant in the action.

An order vacating an attachment because of such failure, as it involves simply a question of jurisdiction, is reviewable here.

(Argued March 15, 1881; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made September 10, 1880, reversing an order of Special Term which denied a motion to vacate an attachment, and granting the motion for the reason, as stated in the order, "that the summons was not personally served, nor was the publication thereof commenced, within thirty days from the issuing of said warrant." (Reported below, 22 Hun, 472.)

*Samuel Hand* for appellants. This order is appealable. (*Ins. Co. v. Stevens*, 63 N. Y. 331; *Tracey v. Altmeyer*, 46 id. 599.) Even if the summons was not published and was not personally served within thirty days after the granting of the warrant, still the order made at Special Term denying motion to vacate was correct. (Code of Procedure, § 139; *Gere v. Gundlach*, 57 Barb. 13, 17.) The court, had jurisdiction from the time of the granting of the attachment, and the failure to commence the publication of the summons, or to serve the defendant personally, within thirty days from that time, did not oust the jurisdiction already acquired and does not go to the question of jurisdiction, but is an irregularity merely. (*Gere v. Gundlach*, 57 Barb. 13, 17; *Simpson v. Burch*, 4 Hun, 315; *Buckhardt v. Sanford*, 7 How. 329; 6 id. 47; *Carson v. Ball*, 40 Barb. 452; *Bartlett v. Spicer*, 75 N. Y. 528; *Pennoyer v. Neff*, 5 Otto, 714; Conkling's Admiralty, 491.) The motion could not be granted

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because the irregularity complained of is not pointed out or specified in the notice of motion. (Supreme Ct. Rule 46, 1871; *Barker v. Cook*, 40 Barb. 254; *Perkins v. Mead*, 22 How. 476; *Selover v. Forbes*, id. 477; *People v. Kennie*, 2 Hun, 346; *Lewis v. Graham*, 16 Abb. 126.) Defendant's appearance had the effect to cure the irregularity. (*Pizley v. Winchell*, 7 Cow. 365; *Dix v. Palmer*, 5 How. 233; *Baxter v. Arnold*, 9 id. 445; *Webb v. Mott*, 6 id. 439; *Sprague v. Irwin*, 27 How. 51; *Hyde v. Patterson*, 1 Abb. 248.) The defendant's delay in making his motion to vacate for a period of more than ten years was such laches as operates to cure as a waiver of the irregularities in the method of proceeding. (*Lawrence v. Jones*, 15 Abb. 110; *Martin v. Lott*, 4 id. 365; *McEvers v. Markler*, 1 Johns. Cas. 248; *Nichols v. Nichols*, 10 Wend. 560; *Patterson v. Graves*, 11 How. 91; *Jones v. Slate Co.*, 16 id. 129; *Ready v. Wilson*, 9 id. 34; *Wood v. Anthony*, id. 78.) For defects or irregularities not affecting the jurisdiction of the court the remedy is given to the party alone, and third parties are not entitled to have the attachment set aside. (*Jacobs v. Hogan*, 15 Hun, 197; *Gere v. Gundlach*, 57 Barb. 13, 17; *Simpson v. Burch*, 4 Hun, 315; *Matter of Griswold*, 13 Barb. 412.)

*L. H. Arnold, Jr.*, for respondent. Failure to serve or publish the summons within thirty days after the warrant was issued constituted a jurisdictional defect which invalidated the attachment. (*Taylor v. Troncosco*, 76 N. Y. 599; *Mojarietta v. Laenz*, 10 Weekly Dig. 61; § 227 of the old Code, as amended by the Laws of 1866, chap. 824, § 7; new Code, § 638; old Code, § 139; new Code, § 416; *Wopple v. Goble*, 53 Barb. 517; *Kelly v. Countryman*, 15 Hun, 97; *Taddiken v. Cantrell*, 1 id. 710; *Gere v. Gundlach*, 57 Barb. 13; *Simpson v. Burch*, 4 Hun, 315.) The allegations of the appellants that the motion was made on behalf of his assignees is a mistake. But the point is immaterial, as the assignees now have the same right as the respondent to make the

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motion. (New Code, § 682; *Taylor v. Troncosco*, 76 N. Y. 599; *Steuben Co. B'k v. Alberger*, 78 N. Y. 252.)

DANFORTH, J. The attachment was granted under the Code of Procedure, upon the ground that the defendant was a non-resident (§ 227). It has been vacated for the reason that the summons was not personally served or the publication thereof commenced within thirty days from the issuing of the warrant. Thus the decision did not relate to the rights of the parties as between themselves, nor involve the exercise of discretion by the court, but its power merely. The question, therefore, is one of jurisdiction and is properly before us for review; and as the right to this process was conferred by statute and is limited by its provisions, the plaintiffs must bring the case within its authority and show that their proceedings conformed to it. Thus an attachment can issue only "in an action," and as under the original Code (Laws of 1848, chap. 379, tit. V., § 106), there could be no action until after the actual service of a summons. The attachment afterward provided for (Laws of 1849, chap. 438, § 227), was of no avail against a non-resident unless he could be found within the State. (*Kerr v. Mount*, 28 N. Y. 639.) The difficulty suggested by this result was remedied in 1866 (Laws of 1866, chap. 723, § 6), when it was declared that for the purpose of an attachment "an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made or publication thereof commenced within thirty days." Here is a plain condition, on which the vitality of the attachment depended; and it has not been complied with. It was good when issued, but remained so for thirty days only, unless within that time one or the other of the two steps was taken. The plaintiffs, however, neither served the summons personally nor by publication. At the end of that time the statutory bar fell, and with it the attachment. The jurisdiction which attached upon allowance of the warrant ceased, and as to that proceeding it was as if the statute had been repealed. This consequence necessarily follows the omission to comply with the

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terms of the proviso. When challenged by this motion to uphold the attachment, it was part of the plaintiffs' case to show the issuing of a summons, and that thirty days therefrom had not elapsed, or that within thirty days one of the conditions had been performed; failing in that, they were no better off than if the statute had not been passed.

Nor does section 139, upon which the appellants' counsel relies, go further. The effect there given to the allowance of the provisional remedy is qualified in like manner by the proviso or condition to which I have adverted. The sections may be read together and both stand. They are satisfied by a construction which treats the action as existing for the purpose of supporting the attachment during the time specified, liable to be continued upon defined terms, but ending by lapse of time if those terms are not complied with, and, therefore, incapable of supporting any further proceedings. The same result was reached by the General Term of the seventh district in *Waffle v. Goble* (53 Barb. 517), decided June, 1868, after a careful examination by a very learned court, and the decision then made has been repeatedly followed (*Taddiken v. Cantrell*, 1 Hun, 710; *Kelly v. Countryman*, 15 id. 97); and to the same effect upon a statute not dissimilar are *Taylor v. Troncoso* (76 N. Y. 599), and *Mojarríeta v. Saenz* (80 id. 548). The appellants cite *Gere v. Gundlach* (57 Barb. 13), and *Simpson v. Burch* (4 Hun, 315.) In the first of these, *Waffle v. Goble* (*supra*) was not referred to, and neither of them is necessarily in conflict with the views there expressed. The doctrine upon which the court below placed its decision stands upon the plain reading of the statute, and is so well sustained by authority that it should be considered settled.

The other questions argued for the appellants relate to matters of irregularity or laches, or the character in which the defendant brought the motion before the court, and if at any time important, are not so in this appeal.

The order appealed from should, therefore, be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.



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In the Matter of the Petition of S. VAN RENSSELAER  
CRUGER, to vacate an assessment.

An omission to award damages as prescribed by the act of 1852 (§ 3, chap. 52, Laws of 1852), for injuries sustained by reason of a change of the grade of a street in the city of New York, is not a "substantial error" in an assessment for the work within the meaning of the act (chap. 838, Laws of 1858, as amended by chap. 812, Laws of 1874), authorizing the vacating of assessments for such errors.

An objection that the assessors acted on an erroneous principle in making the assessment is not tenable; it is a matter of judgment on their part and an error, if any, is not an error in the proceedings and is not a subject for review under the statute.

So, also, an objection that the area of assessment for benefit was too small is untenable, as that matter is committed to the assessors and the board of revision, and the exercise of their discretion in this respect cannot be reviewed on such motion.

(Argued March 15, 1881; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 7, 1879, affirming an order of Special Term, which denied a motion to vacate an assessment upon certain lots of the petitioner, for regulating, etc., Eighth avenue, in the city of New York.

The grounds of the motion appear in the opinion.

*Will Man* for appellant. The omission to award damages for injuries sustained by reason of the change of grade was a substantial error for which the assessment should be vacated. (Laws of 1852, chap. 52, § 3, p. 47; *People v. Green*, 64 N. Y. 606; *People ex rel. Doyle v. Green*, 3 Hun, 755; *Matter of Anderson*, 60 N. Y. 457.)

*J. A. Beall* for respondent. An objection to the principle of the assessment cannot be raised in a proceeding brought under chapter 338 of the Laws of 1858. (*Matter of Eager*, 46 N. Y. 109.) The board of assessors are the sole judges as to the area of assessment, and the court will not review their discretion in this respect. (*Matter of Church St.*, 49 Barb.

455.) The failure to make an award to the petitioner for damages alleged to have been sustained by him by reason of the change of grade could not be regarded as "a fraud or substantial error in the proceedings relative" to the assessment for benefit. (*People ex rel. Tytler v. Green*, 64 N. Y. 607.) The petitioner was not entitled to an award of damages. (Laws of 1852, chap. 52; 53 How. 280, 281, 284-5.)

FINCH, J. The petitioner moved at Special Term to vacate an assessment imposed upon his property for regulating, grading, etc., the Eighth avenue, in the city of New York, from Fifty-ninth to One Hundred and Twenty-second street. The grounds of substantial error alleged were that no award was made for the damage done to his lots by the change of grade; that the board of assessors wrongly apportioned the assessment for benefit since they made no difference between lots where the grade was raised eighteen feet or more and those where it was raised but a few inches; and that the area of benefit subjected to assessment was too narrow, and should have included property north of One Hundred and Twenty-second street. We do not think any of these objections were sufficient to justify the courts in vacating the assessment, for reasons which may be briefly stated.

1. The omission to award damages to the petitioner for injury done to his property by the change of grade was not a substantial error in the assessment. The act of 1858, as amended by that of 1874, provides that, "if in the proceedings relative to any assessment or assessments for local improvements in the city of New York, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed," steps may be taken to vacate the assessment. The petitioner's claim for damages arises, if at all, under the provisions of the act of 1852, relating to changes of grade. The third section of that act requires an estimate to be made of the loss and damage to each owner by reason of the change of grade, and directs that the amount of the award therefor shall be included in the expen-

ses of the assessment. The fourth section provides that the award is to be paid by the city within four months after the confirmation of the assessment. The omission to make such award cannot be properly called a substantial error in making the assessment. Notwithstanding such omission the assessment itself may be entirely regular and accurate. The petitioner is not harmed or aggrieved by the assessment. It is by an omission back of that and which preceded it. His right to damages is not affected by it. There is no necessity of vacating it to enable the petitioner to secure his rights. (*People ex rel. Myers v. B'd of Assessors of N. Y.*, 53 How. 280.) To hold otherwise would produce a very anomalous result. If damages had been awarded to the petitioner, the expenses of the assessment, and his proportionate part thereof, would have been increased, and practically he stands here complaining that the assessment against him was not large enough, and, therefore, should be vacated entirely. If the assessors unlawfully refused to award him damages, he had his remedy. Their action could have been compelled. But the remedy was not by an attack upon an assessment, which had no fault except that a possible item of expense was omitted.

2. The objection to the principle upon which the assessors acted in making their assessments for benefit is equally unavailing. (*Matter of Eager*, 46 N. Y. 109.) The conclusion reached by them was a matter of judgment on their part. It was their duty to judge. They had opportunity to examine personally. Elements went to the formation of their conclusions, which cannot be placed before us. We cannot say their determination was erroneous, even if it was exposed fully to our review. To criticise the results of their judgment would practically require that we should ourselves try every question of value and of benefit, and that too upon evidence different from that before the assessors. Their error of judgment, if in fact it existed, was not an error in the proceedings, and not the subject of our review under the statute.

3. A similar answer disposes of the objection that the area of the assessment for benefit was too small. The law committed that question to the assessors and the board of revision.

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They acted upon such knowledge and observation as they had, and such proof as was presented. They had a discretion to exercise in this respect which we cannot review. The petitioner is in substance asking us to substitute the opinion and judgment of his witnesses as to the area of benefit, for that of the officers to whom it was committed by the statute. (*Matter of Church street*, 49 Barb. 455.)

For these reasons we are of opinion that the petitioner's motion was properly denied.

The order of General Term should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Order affirmed.

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HORACE INGERSOLL, Appellant, v. JOHN W. MANGAM. JOHN  
J. COGER, Purchaser, Respondent.

Under the Code of Civil Procedure (§ 426), to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons, within the State, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient.

A guardian *ad litem* can only be regularly appointed for such a defendant after service of summons, personally or by the substituted mode of service prescribed.

An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the Code (§ 424) which provides that such an appearance shall be equivalent to personal service of the summons.

In an action to foreclose a mortgage, one of the defendants, who owned an interest in the mortgaged premises, was an infant under the age of fourteen; he resided with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother, in this State, who, after such service, upon her own application, was by order appointed a guardian *ad litem*, with authority to appear and defend in behalf of the infant, and she appeared and put in a general answer. Upon application to compel a purchaser at the sale under the judgment to complete his purchase, *held*, that the court had no jurisdiction over the infant defendant to appoint a guardian *ad*

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*litem*, as said defendant had not been brought in, and the action had not been commenced as against him (Code, § 416); that an appearance by the guardian was not an appearance by the infant; that the judgment, therefore, was not binding upon him, the sale under it did not convey a good title, and the motion was properly denied.

*Gotendorf v. Goldschmidt* (83 N. Y. 110), distinguished.

(Argued March 15, 1881; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made February 15, 1881, reversing an order of Special Term which required John J. Coger, a purchaser upon sale under judgment herein, to complete his purchase. (Reported below, 24 Hun, 202.)

This action was brought to foreclose a mortgage. Judgment of foreclosure and sale was perfected, and upon the sale said Coger became the purchaser, but refused to complete his purchase. The ground of the refusal and the facts pertinent thereto appear in the opinion.

*John B. Perry* for appellant. The claim that a guardian *ad litem* could not be appointed without service of a summons upon the infant is untenable, and failure to make such service was not error, either as to jurisdiction or practice. (*Croghan v. Livingston*, 17 N. Y. 223; *Glover v. Hawes*, 19 Abb. Pr. 161; *Disbrow v. Folger*, 5 id. 53; *Varian v. Stevens*, 2 Duer, 635; Bouvier's Law Dict., title Guardian *ad litem*; Tyler on Infancy, 206; *Grant v. Van Schoonhoven*, 9 Paige, 255; Code, § 426.) If an infant defendant is over fourteen he has the right to petition, though not served, being *sui juris* as to service; and jurisdiction is complete when the guardian so appointed puts in an answer on behalf of the infant. (2 Crary's Special Proceedings, 1869, p. 110, note a; *Disbrow v. Folger*, 5 Abb. Pr. 53; *Varian v. Stevens*, 2 Duer, 635; *Althouse v. Radde*, 3 Bosw. 410; *Croghan v. Livingston*, 17 N. Y. 218; *Rogers v. McLean*, 34 id. 536; *Bosworth v. Vanderwalker*, 53 id. 597; *Gotendorf v. Goldschmidt*, N. Y. Ct. of App., Alb. L. J., Feb. 5, 1881; *Borden v. Fitch*, 15 Johns. 121; 1 Barb. Ch. 86; *Heller v. Heller*, 6 How. Pr. 194.)

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Opinion of the Court, per ANDREWS, J.

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*S. M. & D. E. Meeker* for respondent. Civil actions in courts of record of this State must be commenced by the service of a summons or by the voluntary appearance of the defendant. (§§ 416, 424, 427, and chap. 5, title 1, art. 2, Code of Civil Procedure.) With the single exception of actions in partition the above proposition is of universal application. (*Sandford v. White*, 56 N. Y. 359; *Hewlett v. Wood*, 62 id. 75; *Althouse v. Radde*, 3 Bosw. 410; *Disbrow v. Folger*, 5 Abb. 53; *Rogers v. McLean*, 34 N. Y. 536; *Gotendorf v. Goldschmidt*, 11 Weekly Dig. 395; 22 Alb. L. J. 114; *Fisher v. Stilson*, 9 Abb. 33; *Lathers v. Van Epps*, 4 Lans. 213.) In all actions, save partition, the provisions of the Code of Civil Procedure apply, and an infant must be served with process in order that the court may obtain jurisdiction of his person. (*Glover v. Hawes*, note to *Parks v. Parks*, 19 Abb. 161; *Grant v. Van Schoonhoven*, 9 Paige, 255; *Ontario Bk. v. Strong*, 2 id. 301; *Cook v. Farren*, 34 Barb. 95; *Bosworth v. Vanderwalker*, 53 N. Y. 597.)

ANDREWS, J. The purchaser objects to the title on the ground that the summons was not served on the infant, William Mangam. The action was for the foreclosure of a mortgage executed by the father of the infant, who died before the commencement of the action. The infant is under fourteen years of age and had an interest in the mortgaged premises, and resided, when the action was commenced, with his mother in New Jersey. The summons was personally served on the mother in this State, and after such service, upon her application, she was, by an order of the court, appointed guardian *ad litem* of the infant defendant, and appeared and put in a general answer as such guardian. The summons was not served on the infant, either personally or by publication, and if such service was necessary to give the court jurisdiction to render judgment foreclosing and barring the infant's interest in the premises, the title is defective and the purchaser should not be compelled to complete his purchase.

The Code enacts that a civil action is commenced by the

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service of a summons (§ 416). Where the defendant is an infant under fourteen years of age, it is declared, that personal service must be made by delivering a copy of the summons within this State to the infant, and also to his father, mother, or guardian, or if there is none within the State, to a person having the care or control of him, or with whom he resides, or in whose service he is employed (§ 426). Service on the infant alone, or on the father, mother, guardian or other person mentioned alone, does not constitute a personal service within the statute. Service upon both must concur to answer its requirement. There was, therefore, no personal service of the summons in this case, and there was no attempt to serve by publication.

The Code also provides that a voluntary general appearance of the defendant is equivalent to personal service of the summons (§ 424). It is claimed that the appearance by the guardian *ad litem* was a voluntary appearance by the infant within this section. An infant must appear by guardian (§ 471); but a guardian can only be regularly appointed for an infant defendant after service of the summons personally or by the substituted mode (in certain specified cases), as prescribed. This is clearly implied by the language of the section last cited. It provides that the guardian is to be appointed upon the application of the infant, if he is of the age of fourteen years and upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, if made in the other mode prescribed; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. The application in both cases is to be made after the personal or substituted service of the summons has been made. The order for the appointment of the guardian *ad litem* in this case authorized the guardian appointed to appear and defend the action in behalf of the infant; but the difficulty is, that the order was unauthorized, because the court had no jurisdiction over the infant or to appoint a guardian *ad litem* when the order was made, by reason of the fact that the infant

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had not been brought in and the action had not been commenced against him by the service of the summons, which is the statutory mode by which the court acquires jurisdiction of the person or property of an infant. The appearance by the guardian was not, therefore, an appearance by the infant, and was not within section 424. The infant was incapable of consenting to such appearance, and the guardian could not consent to the exercise of jurisdiction over him by an appearance not preceded by the service of process. The question in this case was raised in *Bosworth v. Vandewalker* (53 N. Y. 597), but was not decided, the court holding that it did not appear that the infants had not been served, and in the absence of such proof, that it would be presumed that the court which rendered the judgment had jurisdiction. It was held by the chancellor in *Grant v. Van-Schoonhoven* (9 Paige, 255), that to authorize the appointment of a guardian *ad litem* of infant defendants under the one hundred and forth-sixth rule in chancery, the petition must distinctly show that the infant had been served with process, or that he had been proceeded against as an absentee and an order obtained for his appearance under the statute. Infants are deemed to be wards of the court, and when brought in by service of process the court will look after and protect their interests. But the court must first acquire jurisdiction before they are bound by its judgment. There is no invariable rule defining what legal proceedings constitute due process of law conferring jurisdiction upon a court to deal with and bind the property of infants. Notice in some form, actual or constructive, is essential, but the legislature may prescribe that such notice shall be given to the parent, or guardian, or other person as representing the infant, and proceedings in conformity with the statute in such cases will be valid and the infant will be bound. Under the Revised Statutes, in proceedings, for partition of lands by petition, jurisdiction over the person and property of infants was acquired by the appointment of a guardian in the first instance, upon notice to such infants or to their general guardian. Service of notice upon the infants was not indis-



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pensable to the exercise of the jurisdiction. (2 R. S. 317, § 2; *Croghan v. Livingston*, 17 N. Y. 218.) The provisions of the Revised Statutes relating to the partition of lands were, by section 448 of the Code of Procedure, made applicable to actions for partition, so far as the same could be applied to the substance and subject-matter of the action, without regard to form; and in *Gotendorf v. Goldschmidt* (83 N. Y. 110), it was held, that under the provisions of the Revised Statutes, and of the Code in force when that action was commenced, personal service of the summons upon an infant defendant, in an action for partition, was not essential to give the court jurisdiction. But this is an action for foreclosure, and is governed by the general rules applicable to other actions. The legislature has seen fit to prescribe that the summons shall be served on infant defendants. This was the mode defined by statute for acquiring jurisdiction over their persons and property. It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service if made; or that it would have been competent for the legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observance.

The order should be affirmed.

All concur, except RAPALLO, J., absent.

Order affirmed.

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NATHANIEL J. WYETH, Appellant, v. THOMAS BRANIFF et al., Respondents.

A mortgage on certain premises owned by plaintiff, having been foreclosed and a sale of the premises being about to take place, under the judgment he agreed with the agent of defendant B., to pay a bonus of ten per cent, for a loan of \$2,000, the judgment to be assigned to B., as collateral security. In pursuance of the agreement said agent gave to plaintiff

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the \$2,000, which he paid to the holder of the mortgage, who thereupon assigned the judgment to B., and plaintiff paid the bonus agreed upon. B. subsequently caused the premises to be sold under the decree, and they were bid off by defendant G., and judgment entered against plaintiff for a deficiency. G. paid no consideration but acted as agent for B. *Held*, that the transaction with B. was a usurious loan, not a purchase by him of the foreclosure judgment; that the agreement to pay the bonus was part of the contract of loan, not a separate agreement to pay the agent, and so far as appeared was for B.'s benefit; that the contract between the parties being void, the assignment made as security for its performance was also void, and transferred to B. no right to enforce the judgment; and that a judgment setting aside the assignment and all subsequent proceedings under the foreclosure judgment was proper.

*Condit v. Baldwin* (21 N. Y. 219), *Kellogg v. Adams* (39 id. 28), distinguished.

*Wyeth v. Braniff* (14 Hun, 537), reversed.

(Argued March 10, 1881; decided March 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made September 10, 1878, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial. (Reported below, 14 Hun, 537.)

This action was brought to set aside an assignment of a judgment to defendant Braniff of an action to foreclose a mortgage made by the plaintiff herein, and also to set aside a sale under said judgment, a deed on such sale to defendant Garrett, a judgment for a deficiency and to enjoin Braniff from enforcing said foreclosure judgment. The judgment of the Special Term granted the relief asked.

The facts so far as material are set forth in the opinion.

*J. M. Guiteau* for appellant. The assignment of the bond and mortgage and decree to Braniff was usurious, and transferred no title to him which he can enforce. (*Kellogg v. Adams*, 39 N. Y. 28; *De Witt v. Brisbane*, 16 id. 508; *Tullmadge v. Bell*, 3 Seld. 328; *Schroepfel v. Corning*, 5 Den. 236; *Rice v. Welling*, 5 Wend. 595, 598; *People v. Liscomb*, 60 N. Y. 559; *Fonda v. Sage*, 49 id. 173.) In this case every inference may be justly taken against the assignee. (*Nat.*

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*Bank v. Lewis*, 75 N. Y. 518.) The loan and the usury were one transaction, and inseparable. (*Algur v. Gardner*, 54 N. Y. 360; *Berlin v. Mapes*, 38 How. 288.) As the contract for the loan was usurious, and cannot be enforced, and the principal debt cannot be collected, neither can the collateral security be enforced. (*De Witt v. Brisbane*, 16 N. Y. 508; *Tallmadge v. Bell*, 3 Seld. 328; 39 N. Y. 28.) The usurious intent having been found by the court, at Special Term, upon sufficient evidence, and there being no evidence to the contrary, it constituted usury. (*Fiedler v. Darrin*, 50 N. Y. 437; *Haughtwout v. Garretson*, 69 id. 342.)

*John D. Stephens, Jr.*, for respondents. Should it be held that the assignment was taken as collateral security for a loan, even then the security taken, being valid, could not be declared usurious, although purchased for a less sum than the amount at the time due upon the bond and mortgage. (*Kellogg v. Adams*, 39 N. Y. 28; *Thurston v. Cornell*, 38 id. 281; *Gray v. Green*, 12 Hun, 599.) An obligation, valid in its inception, is not invalidated by a usurious agreement for the extension of the time of payment. (*The Real Estate Trust Co. v. Keech*, 69 N. Y. 248; *Winstead Bank v. Webb*, 39 id. 325.) It was not a loan, and if it was, is not usurious. (*Crane v. Price*, 35 N. Y. 494.) The acts of an agent intrusted with money to invest at legal interest, exacting a bonus for himself, as a condition for making a loan, without the authority of his principal, does not constitute usury in the principal nor affect the security in his hands. (*Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 id. 165; *Kellogg v. Adams*, 39 id. 28; *Crane v. Hubbell*, 7 Paige, 413; *Woodruff v. Hurson*, 32 Barb. 557; *Brooks v. Avery*, 4 N. Y. 225; *Fellows v. Com'rs Oneida Co.*, 36 Barb. 655.) Neither the bond and mortgage nor assignment were affected by the agreement to pay the usurious premium, and Braniff would be entitled to collect the amount advanced with interest. (*Crane v. Hubbell*, 7 Paige, 413; *Judd v. Sever*, 8 id. 548.) Where one takes an assignment of a mortgage, and afterward buys in the premises under the

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power of sale in the mortgage, the mortgage being valid, although usury in the assignment alleged this will not affect the title under the power of sale. (*Jackson v. Colden*, 4 Cow. 266.) An agent's bonus is not usury even though the borrower believed he was dealing with him as principal. (*Lee v. Chadsey*, 3 Abb. Ct. App. Dec. 43.) The assignment having been made to Thomas Braniff, junior, by his seeking to enforce this security, he does not ratify any unlawful act of Braniff, senior, his agent. (*Bell, Ad'x, v. Day et al.*, 32 N. Y. 165; *Condit v. Baldwin*, 21 id. 219; *Fellows v. Com. Oneida Co.*, 36 Barb. 655; *Estévez v. Purdy*, 66 N. Y. 446.) If Braniff, senior, acted as broker, the transaction was not usurious; he was entitled to extra charge, provided his principal did not receive any of it. (*North v. Sergeant*, 33 Barb. 350.) Should the contract between Wyeth and Braniff, senior, be looked upon as usurious, and by which he was induced to purchase said mortgage, such contract would form no part of the consideration for which the mortgagees assigned said mortgage, and does not affect the assignee's title to the same. (*Kellogg v. Adams*, 39 N. Y. 28.)

DANFORTH, J. There is before us a single question whether the evidence sustains the finding of the trial term, that the judgment or decree was assigned to Thomas Braniff, as collateral security for a loan made by him to the plaintiff, at an unlawful rate of interest. The plaintiff was the only witness. He shows that he was the maker of a bond and mortgage, dated May 28, 1856, given to one Moore, to secure the payment of \$2,000. A foreclosure was perfected September 4, 1871, and a sale of the mortgaged premises was about to take place. At this point of time, the plaintiff says: "One Van Auken, a broker" (living in the neighborhood), "came to me and said, he had \$2,000. I asked him who he represented and he said Mr. Thomas Braniff, and after several interviews in regard to obtaining the loan, he told me it would cost ten per cent. I told him I would pay ten per cent, and some miscellaneous costs, amounting to about \$35. Upon that statement

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I was introduced to Mr. Braniff, by this broker. I saw Mr. Braniff, and *he promised to let me have the money, and he did let me have it*, and I paid him the ten per cent, and I paid the charges outside, amounting to some \$35. I paid Mr. Braniff \$235.

Q. *What were the terms of the loan?*

A. *I took the loan for five years from date of that payment; it was about 3d day of October, 1871. He agreed to let me have the money at ten per cent, and I paid him \$200 for the loan, and the \$35, and all the back interest.*" He says the \$200 was a bonus, that the payment was made in Mr. Hedley's office. Mr. Hedley was the plaintiff's attorney in the foreclosure suit.

"Q. Did Mr. Braniff pay you the \$2,000?

A. Mr. Braniff handed me, when the assignment was made, coterminous with the making and delivery of the assignment, \$2,000 in money, and I handed it to Mr. Hedley; he was acting for the Moore estate; I likewise handed him the back interest, which was about \$90; I paid him all the costs and took a receipt for the payment of it; I then had \$500 in my pocket and I paid the sheriff, and I handed to Mr. Braniff \$235, about; it won't vary \$2.50 from it.

Q. What was done about the mortgage?

A. The mortgage was assigned, and the assignment passed over, on the payment of \$2,000, to Mr. Braniff.

Q. What was the agreement with Mr. Braniff as to the assignment of the mortgage?

A. That it was collateral security for the loan of \$2,000; the man that I had the transaction with and borrowed the money of was there; he was the elder Mr. Braniff; the other one, I never heard of him.

Q. The assignment was made to Thomas Braniff, Jr.?

A. Yes, sir."

There is here no cover, no device, and it is quite impossible to construe this testimony so that it shall not bring the case within the statute. There is the agreement for the loan of money; the loan; the taking therefor in pursuance of the

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agreement of a sum of money greater than at the rate of \$7 upon \$100, for one year. There is the intent, and the act concurring. The story is very brief, and very plain. It was credited by the trial judge. It was not discredited by the General Term, but that court held that it did not sustain the finding. On the contrary, "that it was not a loan to the plaintiff, but a purchase by defendant Braniff, of a decree in foreclosure." We cannot, however, overlook the fact, that between Braniff and the assignor there was no communication. That the application was by the plaintiff to Braniff for a loan; that Braniff agreed to let him have the money at ten per cent as above stated, and did so. That the money was paid by Braniff, not to Moore, or his attorney, but to the plaintiff, and then that the agreement with Braniff was that the decree should be assigned as collateral security for the loan of \$2,000. I can find no element of a sale. It appears, however, that Braniff, with whom this arrangement was made, was not Braniff, the defendant, but Braniff, Sr., the father of the defendant. Braniff, this defendant, then lived in New Orleans, and was there. Braniff, Sr., was his agent, as the trial court found. The learned judge at General Term says: "Assuming the transaction to have been a loan to plaintiff, an agreement with his" (defendant's) "agent to pay him ten per cent to procure the loan does not bring the usurious agreement home to defendant." I can find no evidence of such an agreement. The payment of the \$200 was obviously part of the contract of loan, and the case is directly within *Algur v. Gardner* (54 N. Y. 360). *Condit v. Baldwin* (21 id. 219) is cited in support of the judgment of General Term. But the agreement in that case was unlike that disclosed in the one before us. In that case there was a separate agreement to pay the agent. Here there is a single agreement on the part of Braniff to let the plaintiff have the money at ten per cent. For aught that appears the agreement was authorized by the defendant, and the sum paid in money received by him. Braniff, the agent, is dead, but Braniff, the principal, is not, and could testify concerning this matter if the truth was otherwise. Neither Van

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Auken, the broker, nor Hedley, the attorney, was examined, yet it is apparent that they had knowledge of part at least of the transaction testified to, and if it had not been fully stated, might have corrected the statement. As it stands there is nothing in the record to show that the usury agreed for, and paid, was not for the benefit of the defendant, or that he did not receive it. (*Algur v. Gardner*, 54 N. Y. 360.) The contract between the parties being void, the assignment of the decree, it having been made as security for the performance of the contract, is also void, and transferred to the defendant no right to enforce it. (*Dewitt v. Brisbane*, 16 N. Y. 508; *Talmage v. Pell*, 3 Seld. 328; *Schroeppel v. Corning*, 5 Den. 236.) The case is not like that of *Kellogg v. Adams* (39 N. Y. 28), where, in consequence of an usurious agreement, the lender (plaintiff) was induced to purchase of Lampson, a third party, not connected with the loan, a valid mortgage, and it was held good in his hands, but is like the case put by the learned judge, there delivering the opinion. He says: "In this case, had the plaintiff taken the assignment of Lamson's mortgage as collateral to the usurious contract, or had the plaintiff loaned the whole \$4,000 to Adams, and the latter had paid Lampson his \$3,000 and procured him to assign his mortgage to the plaintiff as collateral to Adams' undertaking to repay the usurious loan, it is clear that the assignment would have been void within the principle of the two cases last mentioned" (*Dewitt v. Brisbane*, and *Talmage v. Pell*, *supra*), and to the same effect is the opinion of HUNT, Ch. J., in the same case. It should be observed that the judgment in this case does not deal with the mortgage, or the decree, but with the assignment only, and subsequent proceedings thereon by the assignee, and therefore is within the limitation suggested by ALLEN, J., in *Patterson v. Birdsall* (64 N. Y. 294). His right to proceed under it depends upon his contract with the plaintiff, and as that is invalid, his attempt to enforce it must, upon the same principle, also fail. As the purchase at the sale, brought about by the defendant Braniff, was made by the defendant Garrett, as the agent of Braniff, and upon no new consideration, that also was properly set aside.

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The order of the General Term should, therefore, be reversed, and the judgment of the Special Term affirmed, with costs.

MILLER, EARL and FINCH, JJ., concur; FOLGER, Ch. J., RAPALLO and ANDREWS, JJ., dissent.

Order reversed and judgment affirmed.

SARAH A. STEELE, Respondent, v. DAVID V. BENHAM, as Sheriff, etc., Appellant.

To satisfy the provision of the statute (Chap. 279, Laws of 1883, as amended by chap. 501, Laws of 1873), declaring every chattel mortgage not accompanied by immediate delivery and "followed by an actual and continued change of possession" of the mortgaged property to be void unless the mortgage is filed, and that a mortgage so filed shall cease to be valid as against creditors after one year unless a copy be filed, etc., a constructive or legal change of possession is insufficient; the possession by the mortgagee must be actual, open and public.

S., who was carrying on a manufacturing business on premises owned by him, executed to H. a mortgage on certain of his personal property used in the business. The mortgage was duly filed. S. remained in possession and continued to carry on the business. The mortgage was not refiled as required by the statute. In an action to recover for the alleged taking and conversion of the mortgaged property which had been levied upon by defendant under an execution against S., the testimony on the part of the plaintiff, who is the wife of S., was to the effect that the mortgage soon after its execution was for a valuable consideration assigned to her; that the business and property were *formally* turned over to her, she giving to S. a power of attorney authorizing him to carry it on for her and agreeing to pay him a stipulated sum for his services; that she went to the shop once or twice and gave some directions but took no personal charge of the business, and S. continued to carry on the business, having personal charge of and apparent actual possession of the property as before. *Held*, that there was no such possession in the plaintiff as the statute requires; and that therefore, the mortgage not having been refiled, ceased to be valid at the end of the year and the property was lawfully levied upon by defendant; and this although at the time of the levy the pay day named in the mortgage had passed.

*Steele v. Benham* [Mem.] (21 Hun, 411), reversed.

(Argued March 18, 1881; decided March 25, 1881.)



## Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made on the second Tuesday of June, 1880, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial. (Mem. of decision below, 21 Hun, 211.)

This action was brought to recover damages for the alleged taking and conversion of a quantity of personal property consisting of tools, machinery and other property used in the business of manufacturing agricultural implements, which property had been levied upon by defendant, under and by virtue of an execution against Linus G. Steele, plaintiff's husband.

The facts appear sufficiently in the opinion.

*E. W. Gardner* for appellant. As matter of law, the Steele mortgage was rendered fraudulent and void by the agreement between the mortgagor and mortgagee, allowing the latter to go on and sell the property mortgaged, make it up into agricultural implements, and use and enjoy the proceeds for his own purposes. (*Southard v. Pinckney*, 72 N. Y. 424; *Edgell v. Hart*, 9 id. 213, 216; *Yates v. Olmsted*, 56 id. 632; *Russell v. Winne*, 37 id. 593; *Chatham Nat. B'k v. O'Brien*, 6 Hun, 231; *Ford & Rockwood v. Williams*, 13 N. Y. 577; *Griswold v. Sheldon*, 4 id. 581; *Dutcher v. Swartwood*, 15 Hun, 31; *Wood v. Lowry & D.*, 17 Wend. 492; *Benedict & O. v. Smith*, 10 Paige, 126.) The original mortgage never having been refiled it ceased to be valid as against the creditors of the mortgagor one year from the date of filing. (3 R. S. [6th ed.] p. 144, § 12, marg. p. 136.) To avoid the effect of a failure to file a copy of the chattel mortgage there should be an actual change of possession, not a constructive possession, nor a paper change, nor a symbolical change. (*Topping v. Lynder*, 2 Rob. 488; *Porter v. Parmele*, 52 N. Y. 185, 189; *Bullis v. Montgomery*, 50 id. 352; *Fitch v. Humphrey*, 1 Denio, 163; *Hale v. Sweet*, 40 N. Y. 97, 101; *Crandall v. Brown*, 18 Hun, 463; *Ely v. Comley*, 19 N. Y. 496; *Camp v. Camp*, 2 Hill, 628; *Hanford v.*

## Statement of case.

*Archer*, 4 Hill, 173, 297; *Otis v. Sill*, 8 Barb. 102, 109, 110; *Benedict v. Smith*, 10 Paige, 126; *Thompson v. Van Vecten*, 27 N. Y. 568; *Wood v. Lowry*, 17 Wend. 492.)

*Henry N. Field* for respondent. It is now well settled that the legal effect of a chattel mortgage is to vest in the mortgagee the entire legal title to the property mortgaged, subject only to be defeated by the performance of the condition by the mortgagor. (Thomas on Mortgages, p. 442; *Mattison v. Baucus*, 1 Comst. 295; *Bragelman v. Dane*, 69 N. Y. 69; *Butler v. Miller*, 1 Comst. 496; *Hill v. Beebe*, 3 Kern. 565.) Under the "danger clause," in this mortgage, the mortgagee had an absolute and legal right to take possession of the property at any time he deemed himself unsafe, and for his own interest, and thus bar the equity of redemption even before the debt became due. (*Smith v. Post*, 1 Hun, 516; *Huggans v. Fryer*, 1 Lans. 276; *Chadwick v. Lamb*, 29 Barb. 518; *Hill v. Beebe*, 1 Kern. 565; *Peck v. Milk*, 20 Barb. 616; *Nelson v. Drake*, 14 Hun, 465.) By the breach in the condition of the mortgage, the legal title to the property in question became absolute in the mortgagee, and the mortgagor thenceforth can claim no legal rights thereto. (*Sickles v. Mead*, 2 Lans. 222; *Lewis v. Palmers*, 28 N. Y. 271; *Hall v. Sampson*, 35 id. 274; *Judson v. Easton*, 58 id. 664; *Campbell v. Berch*, 60 id. 214.) The plaintiff, under the assignment given to her by the mortgagee, possessed every right which the mortgagee had. (*Campbell v. Berch*, 60 N. Y. 214; *Nelson v. Drake*, 14 Hun, 465; *Rich v. Milk*, 20 Barb. 616; *Alexander v. Hard*, 64 N. Y. 228.) At the time the levy was made the judgment debtor had no interest in the property in question, and the sheriff was a trespasser. (*Campbell v. Grant*, 39 Barb. 606; *Judson v. Easton*, 58 N. Y. 664; *Butler v. Miller*, 1 Comst. 496; *Powell v. Preston*, 1 Hun, 513; *Galen v. Brown*, 22 N. Y. 37.) The respondent having taken possession of the property by virtue of the mortgage, the debt was extinguished, and she lost nothing by omitting to refile the mortgage. A refile is only necessary when the debt, or

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some part thereof, remains unpaid. (*Levin v. Russell*, 42 N. Y. 251; *Otis v. Sill*, 8 Barb. 102; *Ely v. Canly, Sheriff, etc.*, 19 N. Y. 496; *Porter v. Parmely*, 52 id. 185.) Even if mortgagee had consented to have some of the machines sold after the execution of the mortgage, this would not make the mortgage void. It would do no more than discharge the lien on the goods actually sold. (*Yates v. Olmstead*, 56 N. Y. 632; *Conklin v. Skelly*, 28 id. 360.)

EARL, J. The defendant, by virtue of an execution issued to him upon a judgment against Linus G. Steele, the husband of the plaintiff, seized and sold certain personal property which she claimed belonged to her, by virtue of a chattel mortgage executed by her husband to Henry M. Steele, and by him assigned to her; and this action is to recover for the conversion of such property.

On and prior to January 25, 1877, Linus G. Steele was carrying on a manufacturing business upon premises owned by him, and in that business he owned, possessed and used certain personal property. On the day last named, being indebted to Henry M. Steele, he executed to him a mortgage upon such property, to secure the payment to him of the sum of \$1,222.49, in one year from the date of the mortgage. The mortgage was filed in the town clerk's office on the same day. The mortgagor remained in possession of the property and continued to carry on his business as before. On the 1st day of September thereafter the mortgagee, for value received, assigned the mortgage to the plaintiff, and she claims that soon after she took possession of the property under the "danger clause" contained in the mortgage, and she executed and delivered to her husband a power of attorney authorizing him to carry on the business for her, in which she agreed to pay him \$50 per month for his services. He continued to carry on the business and apparently remained in actual possession of the property as before down to the time of the levy upon the property. He had the personal charge of the property, using it and dealing in it and managing it. At the end of the year

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the mortgage was not refiled as required by the statute, and the defendant seized the property, by virtue of the execution held by him, after the expiration of the year, about January 30, 1878.

It is provided in the statute (Laws of 1833, chap. 279, as amended by chap. 501 of the Laws of 1873), that every chattel mortgage "which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed," etc., and that a mortgage so filed shall cease to be valid as against the same persons after the expiration of one year from the filing thereof, unless a true copy thereof be filed as required in the act.

Here, as a copy of the mortgage was not filed, and the levy upon the property was after the expiration of the year, the plaintiff must show that there had been an actual change of possession, and that she was in the actual possession of the property at the time the levy was made.

To satisfy the statute the possession must be actual, not merely constructive or legal. In *Topping v. Lynch* (2 Robertson, 484), it was said that the words "actual and continued change of possession" in this statute "mean an open public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has ceased." In *Crandall v. Brown* (18 Hun, 461), it was said that "constructive possession cannot be taken under a chattel mortgage;" that "possession must be taken in fact," and that "possession cannot be taken by words and inspection." The case of *Hale v. Sweet* (40 N. Y. 97) shows how literally the courts construe this statute as to the actual change of possession. In that case the mortgagee sued the sheriff for seizing a canal-boat under an execution against the mortgagor, and the trial judge directed a verdict for the defendant. It was proved upon the trial that the plaintiff (the mortgagee)

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built the boat; that he sold one-half to Jones (the judgment-debtor) and took a mortgage thereon to secure a portion of the purchase-money; that it was agreed between the plaintiff and Jones that the boat should be run on their joint account, each to furnish half of the team, and that Jones should act as master. This agreement had not been terminated at the time of issuing the execution by the plaintiff. The boat was run by Jones, pursuant to the agreement, until the 7th of October, about three weeks before the issuing of the execution, when, as one Hatch testified, the plaintiff employed him to take charge of the boat and run it; that upon that day he went on board, and thereafter run the boat as captain and controlled her until the close of navigation. He further testified that Jones collected the freight earned after he went on board, discharged hands from the boat, and that the clearances of the boat continued to be taken in the name of Jones as captain. It was held that this evidence, taken as a whole, failed to show that the plaintiff had taken possession of the boat to the exclusion of Jones, and that the judge properly directed a verdict for the defendant. In *Camp v. Camp* (2 Hill, 628), the mortgagor testified that when the mortgage was executed he made a formal delivery of the property to the mortgagee, going around with him and pointing out the several articles; that the mortgagee then requested him to take charge of the property at a stipulated compensation and manage it as agent; that he immediately took charge of it accordingly, and had not since possessed it except as agent of the mortgagee. It appeared that the property had not been removed from where it was when the mortgage was given, but had ever since remained in the mortgagor's charge. The circuit judge held that these circumstances could be deemed to constitute "an immediate delivery" and "an actual and continued change of possession," within the meaning of the statute; and upon review this was held error and a new trial was granted, the court saying: "Actual change of possession imports at least something more than a mere legal or fictitious change, to be worked by the operation of the mortgage itself. Upon any other construction the statute means nothing. Nor

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can parties agree that the mortgagor shall continue in actual possession, and call this the possession of the mortgagee." In *Otis v. Sill* (8 Barb. 102), Judge PAIGE said: "It has been repeatedly decided that if an assignee or mortgagee leaves goods assigned or mortgaged in the possession of the assignor or mortgagor as his agent, this is not an actual change of possession, within the meaning of the fifth section of the statute of frauds." See, also, *Hanford v. Artcher*, 4 Hill, 271.

Here the possession of the plaintiff fell far short of being actual, within the purview of these authorities. 'It is true that the plaintiff testified in a general way that she took possession of the property, and that she was in possession; but such general evidence has no weight when the facts are proved showing precisely what was done. (*Miller v. Long Island R. R. Co.*, 71 N. Y. 380.) All she did was to appoint the mortgagor her agent; to go to the shops where the property was once or twice; and to give some instructions about the business. She testified that she took no personal charge of the business only as she appointed her husband her agent, and that is "what she meant by taking possession." It matters not that her husband carried on the business as her agent. He had the actual possession and control of the property at all times. Her possession was merely constructive or legal, and such a possession does not answer the requirement of the statute. That under such circumstances the mortgage was absolutely void as to the judgment creditors of the mortgagor, and that the property could be taken and sold by virtue of executions against him, even after the pay day named in the mortgage had passed, there can be no doubt. (*Ely v. Carnley*, 19 N. Y. 496; *Porter v. Parmley*, 52 id. 185.)

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

# MEMORANDA

OF THE

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS  
VOLUME, WHICH ARE NOT REPORTED IN FULL.

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SIMON STERNE, Respondent, v. CHARLES GOEPP, as Adminis-  
trator, etc., Appellant.

(Argued January 21, 1881 ; decided February 1, 1881.)

MEM. of decision below. (20 Hun, 396).

*W. T. B. Milliken* for appellant.

*Samuel Hand* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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CHARLES S. HALL, Appellant, v. B. BRADLEY KEELER, et al.,  
Respondents.

(Argued January 24, 1881 ; decided February 1, 1881.)

*Samuel Hand* for appellant.

*Edward Harris* for respondents.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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ABRAHAM LOTT, Administrator, etc., Respondent, v. FRANK CROOKE, Executor, etc., Appellant.

(Argued January 26, 1881; decided February 1, 1881.)

*Frank Crooke* for appellant.

*John H. Kemble* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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CATHARINE A. ABBOTT, Administratrix, etc., Respondent, v. NICHOLAS H. DECKER, Impleaded, etc., Appellant.

(Argued January 24, 1881; decided February 1, 1881.)

*Ira D. Warren* for appellant.

*J. A. Dennison* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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JOHN F. PEYSER et al., Appellants, v. FREDERICK B. WENDT, as sole Surviving Executor, etc., et al., Respondents.

71322  
An action for an accounting and partition and other relief is not entitled to a preference because the construction of a will is incidentally involved therein.

To give a cause a preference under the Code of Civil Procedure (§ 791, subd. 5), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose.

(Argued February 1, 1881; decided February 8, 1881.)

This was a motion to strike this cause from the preferred calendar.



The action was for an accounting by the executors of the will of David M. Peyser, deceased, and for the partition of his real estate.

Preference was claimed upon the ground that the action involved the construction of the will of the deceased. The court say:

"To give this cause the preference claimed, it must be an action expressly brought 'for the construction of or an adjudication upon a will.' This is an action for an accounting and partition and other relief, and it matters not that the construction of a will is incidentally involved."

*Charles Wehle* for motion.

*George A. Black* opposed.

*Per curiam* opinion for granting motion.

All concur.

Motion granted.

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GREENLEAF K. SHERIDAN, as Executor, etc., Appellant, v.  
JULIA R. HOUGHTON et al., Respondents.

(Submitted January 17, 1881; decided February 8, 1881.)

APPEAL from judgment of General Term, reversing a decree of the surrogate of the county of New York, admitting to probate the will of David S. Jackson, deceased. (Mem. of decision below, 16 Hun, 628.)

By section 8 of chapter 359 of the Laws of 1870, jurisdiction was conferred upon the surrogate of the county of New York, to take proof of lost or destroyed wills — the same jurisdiction as was vested in and possessed by the Supreme Court. Formerly the sole jurisdiction to prove such wills was vested in the Court of Chancery (2 R. S. 67, § 63); and by the Constitution of 1846, and the Judiciary Act of 1847, that jurisdiction was transferred to the Supreme Court. At the time the appeal in this case was taken to the Supreme Court, appeals

from the decrees of surrogates were regulated by the Revised Statutes, and not by the Code. (§ 471 of the Code of Procedure.)

Proceedings were instituted to prove this will as a destroyed will before the surrogate of New York; and after hearing the proofs of the parties, he made a decree establishing the will. This appellant appealed to the Supreme Court from such decree, and there the decree was reversed "on a question of law," and the judgment of reversal provided as follows: "That the proceedings be and the same hereby are remitted to the surrogate of the county of New York, who is hereby directed to proceed with the hearing of the case, and that no costs be allowed to either party on the said appeal." From that judgment the appellant appealed to this court, except from so much thereof as reversed the decree appealed from, and as stated the reversal to have been on a question of law.

The appellant here complained that the proceedings were remitted to the surrogate for a further hearing before him; also that he was entitled to costs. The court say: "If the reversal had been upon a question of fact, it would have been the duty of the Supreme Court to direct the case to be tried before a jury upon feigned issues. (2 R. S. 609, § 98.) But in the case of a reversal upon a question of law, it is provided (2 R. S. 609, § 96), that costs shall be awarded "against the party maintaining the decision of the surrogate, either personally or out of the estate of the deceased." Section 97 provides that the reversal upon a question of law shall be certified to the surrogate whose decision was appealed from, with the award of costs made by the court, and that the surrogate shall enforce payment of the costs awarded, in the same manner as if such award had been made by him, and shall proceed upon such reversal as directed in the first title of the sixth chapter of the second part of the Revised Statutes. The title referred to is the one providing for the proof of wills and the issuing of letters thereon by the surrogate, and other testamentary matters. Hence it was entirely proper for the Supreme Court to remit the matter to the surrogate for a further hearing according to law. The parties could again be brought be-

fore him and the hearing had *de novo*; or the same evidence might be used, with such other evidence as any party desired to offer. Such practice was apparently sanctioned in *Talbot v. Talbot* (23 N. Y. 17), and is, we think, plainly required by the language of the statute.

The appellant also claims that costs were not awarded to him, either against the respondents personally or out of the estate of the deceased. This complaint seems to us well founded. The statute is peremptory that they shall be so awarded. The language used will admit of no other construction.

The judgment of the General Term should therefore be affirmed, except as to the costs, and as to them should be reversed, and the case remitted to the General Term, that it may determine whether the costs shall be paid by the respondents personally, or out of the estate of the deceased; costs of the appeal to this court of both parties to be paid out of the estate of the deceased."

*Samuel Riker* for appellant.

No one appearing for respondents.

EARL, J., reads for affirmance, except as above stated.  
Judgment accordingly.

In the Matter of the Petition of MARY G. PINCKNEY to vacate  
an assessment.

(Argued January 18, 1881; decided February 8, 1881.)

*John C. Shaw* for appellant.

*A. J. Vanderpoel* for respondent.

Agree to affirm without opinion.

All concur, except RAPALLO, J., absent.

Order affirmed.

GRIFFITH G. WILLIAMS, as Administrator, etc., Respondent,  
v. AMAZIAH D. BARBER, Appellant.

(Submitted January 24, 1881 ; decided February 8, 1881.)

*Adams & Swan* for appellant.

*John D. Collins & A. C. Cox* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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JAMES MULDOON et al., Respondents, v. WILSON H. BLACKWELL,  
et al., Appellants.

It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed an exception should be taken.

(Submitted January 24, 1881 ; decided February 8, 1881.)

THIS action was brought to recover for work and materials. The answer alleged that the work was done and materials furnished under a special contract, which plaintiffs failed to perform, and alleged damages to a sum specified for the failure to perform. No reply was served. It was urged upon the appeal that the answer contained a counter-claim, which, by not being replied to, was admitted.

The court say in reference thereto : " The answer is somewhat equivocal, and it is not entirely certain that the defendants intended by their allegations to set up a counter-claim. But whether they did or not, it is not now available to them. They did not claim at the trial that any counter-claim was admitted. The case was tried and decided as depending entirely upon the evidence given by the plaintiffs. If the claim had been made that a counter-claim was set up in the answer, the

plaintiffs might have moved the court for leave to serve a reply, or have shown that a reply was in some way waived. The attention of the referee should have been called to the alleged counter-claim, and it should have been insisted on at the trial, and if not allowed, an exception should have been taken. It is too late for the defendants now for the first time, so far as appears in the case, to claim that their answer contains a counter-claim, which is admitted."

*W. T. Birdsall* for appellants.

*J. A. Shoudy* for respondents.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

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CAROLINE RICEMAN, Executrix, etc., Respondent, v. H. O.  
HAVEMEYER et al., Appellants.

(Argued January 25, 1881; decided February 8, 1881.)

THIS action was brought to recover damages for alleged negligence causing the death of George M. Riceman, plaintiff's testator.

The facts appearing were substantially as follows:

The deceased was, at the time of the accident causing his death, in the employ of defendants as assistant-engineer in their sugar refinery. In the basement of the refinery were two rows of tanks with a flagged passage-way two feet six inches wide between them. At one point there was a gutter across this passage-way, a foot above it, with a block on either side to assist in getting over it. The deceased went through this passage-way to examine a pump which was out of repair, and in returning fell into a tank containing hot sugar syrup, which was uncovered, receiving injuries causing his death. No one saw the accident. The deceased had been in defendants' employ for two days and had during that time been to and fro over this passage-way. He had been over it five times just before the accident; at that time a fellow-servant went over safely, just ahead

of him. The way was well lighted. The deceased had been especially charged to be careful and not fall into the tank. *Held*, that plaintiff failed to show directly or inferentially that her testator was free from contributory negligence, and that a refusal to nonsuit was error.

*Theodore F. Jackson* for appellants.

*Winchester Britton* for respondent.

FOLGER, Ch. J., reads for reversal and new trial.

All concur.

Judgment reversed.

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JOHN W. GREENE, as Administrator, etc., Respondent, *v.* JOHN MARTINE, as Executor, etc., et al., Appellants.

(Argued January 27, 1881; decided February 8, 1881.)

REPORTED below (31 Hun, 136).

*Charles A. Jackson* for appellants.

*G. Tillotson* for respondent.

Agree to affirm on *Coit v. Campbell* (82 N. Y. 509).

All concur.

Judgment affirmed.

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MARION B. HOLYOKE, as Executrix, etc., Appellant, *v.* UNION MUTUAL LIFE INSURANCE COMPANY, Respondent.

(Argued January 27, 1881; decided February 8, 1881.)

REPORTED below (22 Hun, 75).

*Edward B. Cowles* for appellant.

*Merritt E. Sawyer* for respondent.

Agree to affirm on opinion of court below.

All concur.

Judgment affirmed.

HENRY E. SPRAGUE, Appellant, v. EDWIN BUTTERWORTH et al., Respondents.

(Argued February 1, 1881; decided February 8, 1881.)

REPORTED below (22 Hun, 502).

*Robert P. Harlow* for appellant.

*J. Langdon Ward* for respondents.

Agree to dismiss appeal. No opinion.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

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JAMES H. CHAMBERS, Appellant, v. WILLIAM H. APPLETON et al., Respondents.

(Argued February 1, 1881; decided February 8, 1881.)

THIS was an appeal from an order of General Term, affirming an order of reference herein.

The action was brought to recover damages for an alleged breach of contract on the part of the defendants by which they agreed to furnish their publications to fill the orders which had been obtained by plaintiff therefor. Plaintiff claimed the difference between the agreed price for which the publications were to be furnished to him, with expense of delivery added, and the price he was to receive under the orders. *Held*, that the action was one *ex contractu* involving the examination of a long account within the meaning of the rule applicable to such cases, and so was referable.

*William W. Badger* for appellant.

*Douglas Campbell* for respondents.

*Per curiam* opinion for dismissal of appeal.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff in error,  
v. AMENZO FREY, Defendant in error.

(Argued February 8, 1881; decided February 8, 1881.)

REPORTED below (21 Hun, 282).

*J. Keck* for plaintiff in error.

*J. M. Dudley* for defendant in error.

Judgment affirmed on argument.

All concur.

Judgment affirmed.

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CATHERINE L. PHIPPS, Appellant, v. THOMAS D. CARMAN, Re-  
spondent.

(Submitted February 1, 1881; decided February 11, 1881.)

REPORTED below (23 Hun, 150).

*Geo. P. Avery* for appellant.

*D. P. Barnard* for respondent.

Agree to affirm without opinion.

All concur.

Order affirmed.

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JOHN THEISS, as Administrator, etc., Respondent, v. SAMUEL  
H. BARRONS et al., Appellants.

(Argued February 2, 1881; decided February 11, 1881.)

*W. H. Bowman* for appellants.

*Thomas Raines* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.



SARAH A. PARISH, Executrix, etc., Appellant, v. DANIEL W. SMITH, Respondent.

(Argued February 4, 1881 ; decided February 11, 1881.)

*George H. Foster* for appellant.

*John E. Parsons* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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ALMIRA LONG, as Administratrix, etc., Respondent, v. THE VILLAGE OF TONAWANDA, Appellant.

(Submitted February 8, 1881 ; decided February 11, 1881.)

*Osgoodby, Titus & Moot* for appellant.

*P. A. Matteson* for respondent.

AGREE to affirm without opinion.

All concur, except FOLGER, Ch. J., dissenting, and RAPALLO, J., absent.

Judgment affirmed.

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ELIAS M. SPERLING, Respondent, v. WILLIAM C. CONNER, Sheriff, etc., Appellant.

(Submitted February 10, 1881 ; decided March 1, 1881.)

*Almon Goodwin* for appellant.

*Henry A. Root* for respondent.

Agree to affirm without opinion.

All concur, except MILLER, J., not voting, and RAPALLO, J., absent.

Judgment affirmed.

JOHN I. DURYEA, Appellant, v. WILLIAM C. TRAPHAGEN,  
Executor, etc., Respondent.

(Argued January 31, 1881; decided March 1, 1881.)

THE plaintiff had a claim against James W. Wilson, and after the latter's death, presented it to defendant, his executor, by whom it was disputed, and thereupon, with the approval of the surrogate, it was heard before a referee, who reported in favor of the defendant, wholly disallowing the claim. A motion was then made on behalf of the executor, at a Special Term of the Supreme Court, held by Justice JOHN R. BRADY, for a confirmation of the report, and a counter motion was at the same time made by the plaintiff, founded on a case and exceptions, to set aside the report, the first of which motions was granted, and the last denied. After judgment entered, an appeal was taken to the General Term, where the order and judgment were affirmed, Justice BRADY, as the record shows, being at the time a member of the appellate court and joining in its decision.

It was claimed that his action at the General Term was in violation of article 6, section 8 of the Constitution, which provides that "no judge or justice shall sit at a General Term of any court, or in the Court of Appeals, in review of a decision made by him or by any court of which he was at the time a sitting member."

The court say: "We do not see any answer to the objection. We have held in such case that the court of review was improperly constituted, and was not authorized to hear the appeal, and, therefore, its judgment must be reversed, irrespective of the question whether its determination was right or wrong. (*Pistor v. Hatfield*, 46 N. Y. 250; *Real v. The People*, 42 id. 276.)"

*E. H. Benn* for appellant.

*Charles Matthews* for respondent.

FINCH, J., reads for reversal.

All concur.

Judgment reversed.

W. HUDSON STEPHENS, as Executor, etc., Respondent, v. RUFUS  
B. WAITE, Appellant. .

(Argued February 2, 1881; decided March 1, 1881.)

THE questions presented were principally as to the findings of facts. The court held that there was evidence tending to sustain the findings which were, therefore, conclusive here.

*L. J. Dorwin* for appellant.

*C. D. Adams* for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

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JOHN SWENARTON et al., Appellants, v. MARY HANCOCK et al.,  
Respondents.

(Submitted February 8, 1881; decided March 1, 1881.)

REPORTED below (22 Hun, 38). Decided upon the facts in the case.

*Man & Parsons* for appellant Swenarton.

*Jeremiah S. Black & Thomas W. Bartley* for appellant Hutton.

*William H. Taggard* for respondent Locke.

*Rufus L. Scott & Edwin G. Davis* for respondent Walsh.

*James W. Field* and *Kissam & Embury* for respondents Thacher et al.

*Amos G. Hull* for respondents Allen et al.

*Chilion B. Allen* for other respondents.

DANFORTH, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

SAMUEL FORDHAM, Respondent, v. JAMES S. HENDRICKSON et al., Executors, etc., Appellants. •

(Argued February 10, 1881; decided March 1, 1881.)

THIS action was brought to recover upon a lost note for \$700, made by the defendant's testator, payable to the order of one Campbell, and by him indorsed to the plaintiff.

The sole question of fact litigated at the trial related to the ownership of the note by the plaintiff. Upon that question the court say "there was some conflict in the evidence and the verdict of the jury thereon concludes us."

A point was made in this court, for the first time, that it does not appear in the case that the plaintiff gave the bond required by the statute as a prerequisite to a recovery upon the note. No such objection to the recovery was taken at the trial. The court say: "There is no exception which permits the point for our consideration. We must now assume that the bond was given."

*J. Stewart Ross* for appellants.

*Moody B. Smith* for respondent.

EARL, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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ALGERNON S. SULLIVAN, Public Administrator, etc., Respondent, v. THE HOWE MACHINE COMPANY, Appellant.

(Argued February 11, 1881; decided March 1, 1881.)

*S. G. Wheeler* for appellant.

*William Dorsheimer* for respondent.

Agree to affirm without opinion.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

THE FIRST NATIONAL BANK OF WHITEHALL, Respondent, v.  
MARIA TISDALE, Administratrix, etc., et al., Appellants.

(Argued February 11, 1881; decided March 1, 1881.)

THIS action was brought by plaintiff upon a promissory note executed by Henry G. Tisdale, defendants' intestate, for \$7,500, payable to the order of The Whitehall Transportation Company, and indorsed by that company.

The defense was that the note was given without consideration. Defendants claimed and gave evidence tending to show that the note was executed and delivered to plaintiff at the request of its officers, not to be paid by him but to represent that amount of assets, so that the bank might pass an expected examination by the bank examiner, and with the agreement that the bank should protect and care for the paper and that Tisdale should not be called on to pay it. It was claimed by plaintiff and evidence was given showing that the note was given to pay and take up a note of \$5,000 made by Tisdale and loaned to the transportation company and a draft of \$2,500 drawn by it upon and accepted by him, which paper had been discounted by plaintiff; that the note in suit was thereupon discounted by plaintiff and the avails credited to said company, and the \$5,000 note and draft surrendered. The court found with the plaintiff and refused to find an understanding or agreement that the note was to be used to make a better showing with the bank examiner, and that the maker should not be called upon to pay. *Held*, no error; that the court having found that the note was given to take up the other paper, the surrender of these obligations was an ample consideration for the note in suit (*Spencer v. Ballou*, 18 N. Y. 327; *Foungs v. Lee*, 12 id. 551), and that the alleged agreement was beyond the authority of plaintiff's president to make and did not bind it. (*Bank of U. S. v. Dunn*, 6 Peters, 51; *Bank of Metropolis v. Jones*, 8 id. 12; *Wyman v. Hallowell and Augusta Bank*, 14 Mass. 58.)

Plaintiff gave in evidence under objection and exception the entries in the books of the transportation company in refer-

ence to the paper above mentioned. It appeared that Tisdale was a stockholder, director and the vice-president of that company, had access to and had examined its books. *Held*, that the evidence was properly received; that Tisdale was chargeable with knowledge of the entries (*Allen v. Coit*, 6 Hill, 318; *Heartt v. Corning*, 3 Paige, 566); also that it was not essential that the entries should be proved by the clerk who made them. (*Ocean Nat. Bank of N. Y. v. Carll*, 55 N. Y. 440), distinguished.

The entries made in plaintiff's books proved by the cashier were also received in evidence under objection and exception, the court, however, holding that what the bank did, unless from the circumstances Tisdale was shown to have known it, could not affect him. *Held*, no error.

*A. D. Wait* for appellants.

*James Spencer* for respondent.

MILLER, J., reads for affirmance.

All concur.

Judgment affirmed.

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PATRICK FARRELL, Plaintiff in Error, v. THE PEOPLE of THE  
STATE OF NEW YORK, Defendant in Error.

(Submitted February 11, 1881; decided March 1, 1881.)

REPORTED below (21 Hun, 485). Decided on the facts.

*William F. Howe* for plaintiff in error.

*Daniel G. Rollins* for defendant in error.

EARL, J., reads for affirmance.

All concur.

Judgment affirmed.

LAWRENCE BOWE, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendant in Error.

(Submitted February 11, 1881; decided March 1, 1881.)

DECIDED on the facts.

*William F. Howe* for plaintiff in error.

*Daniel G. Rollins* for defendant in error.

All concur; except RAPALLO, J., absent.

Judgment affirmed.

DAVID GOLDEN, Appellant and Respondent; THE MAYOR,  
ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,  
Respondent, and DANIEL KELLY, Appellant.

WILLIAM J. KENNEDY, Appellant and Respondent, *v.* THE  
SAME, Respondent, and RICHARD M. COLLARD, Appellant  
and Respondent.

JOHN O'BRIEN, Appellant, *v.* THE SAME, Respondent, and  
WILLIAM CLANCEY, Appellant.

(Argued February 7, 1881; decided March 8, 1881.)

*D. J. Dean* for appellant the mayor, etc.

*Elliott Sandford* for appellant Commisky.

*Nelson J. Waterbury* for plaintiffs, appellants and re-  
spondent.

Agree to affirm on opinion in *Fagan v. The Mayor* (*ante*,  
p. 348).

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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JAMES H. VAN GELDER, Appellant, v. DAVID H. VAN GELDER  
et al., Respondents.

Where in an equity action the defendants answered separately and a judgment in their favor was affirmed in this court with costs "to the respondents," *held*, that this authorized but one bill of costs.

The allowance of costs in the Supreme Court in such an action, and whether to one or more respondents, is in the discretion of the court below, and its decision is not reviewable here.

(Argued February 2, 1881; decided March 8, 1881.)

THESE were appeals from two orders of General Term of the Supreme Court, one of which reversed an order of Special Term which directed the retaxation of costs of appeal to this court; the other reversed an order of Special Term which directed a retaxation of costs on appeal to the General Term.

The action was an equity one. The defendants answered separately. The complaint was dismissed on trial without costs to either party. Plaintiff appealed to the General Term, where the judgment was affirmed, with costs. The defendants claimed separate bills of costs which were allowed and taxed by the clerk. The plaintiff moved for a retaxation; he also appealed from the judgment to this court, where the judgment was affirmed, "with costs to the respondents." Upon entry of judgment upon the remittitur separate bills of costs were allowed and taxed by the clerk. *Held*, that the order giving each respondent costs of appeal to this court was erroneous. The court say: "Costs were given in this court 'to the respondents' but not to each respondent; one bill only should have been allowed." As to the order relating to costs in the Supreme Court, *held*, that the allowance was within the discretion of the court below, and the action of the clerk having been approved by that court, as appears by the order appealed from, this court had no control over it. (*Herrington v. Robertson*, 71 N. Y. 280; *Taylor v. Root*, 48 id. 687.)

*James H. Van Gelder* for appellant.

*J. A. Griswold & Eugene Burlingame* for respondents.



DANFORTH, J., reads for reversal of order of General Term and affirmance of order of Special Term as to costs in this court, and for dismissal of appeal from order of General Term as to General Term costs.

All concur.

Ordered accordingly.

THE PEOPLE ex rel. MICHAEL FOLEY, Appellant, v. THE BOARD OF POLICE COMMISSIONERS et al., Respondents.

(Argued March 1, 1881; decided March 8, 1881.)

*Horace Russell* for appellant.

*D. J. Dean* for respondents.

Agree to dismiss appeal without opinion.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

ANNA BERGEN et al., Respondents, v. MARY WYCKOFF et al., FRANK CROOKE, Purchaser, Appellant.

*It seems* that the provision of the Code of Civil Procedure (§ 451), in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition.

Where a plaintiff in an action for partition dies after argument at General Term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the General Term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death.

(Argued March 4, 1881; decided March 8, 1881.)

THIS was an appeal from an order of General Term, affirming an order of Special Term requiring a purchaser on sale under a judgment in an action for partition to complete his purchase. He assigned various grounds of objection to the title, among others, that the proceeding

against unknown owners was irregular; that it was governed by the Revised Statutes and not by the Code. The summons, after naming certain parties defendants, concluded by referring to "all other persons (if any) having, or claiming to have, any interest or claim against the premises sought to be partitioned, \* \* \* \* all of whose names are unknown to the plaintiff." The summons, as to such persons, was served by publication for six weeks, upon the assumption that section 451 of the Code of Civil Procedure (1878) applied to actions in partition. The court say: "That section is general, and was, we think, intended to apply to all actions in which service by publication may be made. But it is a sufficient answer to the objection made, that it appears by the moving affidavit, the referee's report, and the judgment, that there were and are no unknown owners, and that the owners were named in the summons and were properly served." After the argument of the appeal at General Term and before the decision, one of the plaintiffs died; that court directed the order of affirmance to be entered *nunc pro tunc*, as of a day prior to the death. *Held*, that the court had power so to direct.

Various other objections were disposed of on the facts.

*Frank Crooke* for appellant.

*Edgar Bergen* for respondents.

*Per curiam* opinion for affirmance.

All concur, except RAPALLO, J., absent.

Order affirmed.

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JAMES R. SMITH, Appellant, v. ANNIE F. TRUSLOW et al., Executors, etc., Respondents.

*It seems* that the mere fact that the purchaser of lands took subject to a mortgage does not render him liable, either legally or equitably, to indemnify his grantor against the mortgage.

*It seems, however*, the rule would be otherwise if the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchaser, if he retained its amount.

(Argued March 2, 1881; decided March 15, 1881.)

THE plaintiff here was defendant in *Campbell v. Smith* (71 N. Y. 26), and brought this action to recover from the estate of defendant's testator the amount paid by him in consequence of the liability imposed by the judgment in that case. His complaint shows that the premises therein referred to were conveyed to the testator subject to the same mortgage, and by deed containing a covenant by which the grantee assumed and agreed to pay the mortgage similar to that upon which his own liability depended; that the testator had notice of the action above referred to, and was required to defend the same at the risk of paying damages and costs if any should thereby be recovered. The defendant by answer denied any obligation to the plaintiff, averred that the covenant on which it appeared to stand was inserted in the deed fraudulently, and asked that it be stricken out and canceled. The truth of the issue made on those allegations was the only one presented upon the pleadings or tried by the court. The finding in favor of the defendant declared that the words and clauses on which the plaintiff relied were unauthorized and their insertion in the deed fraudulent. Judgment was given that they be erased and the deed in that respect reformed.

The court here say: "This conclusion" (i. e. of the trial court) "has been approved by the General Term, and, so far as it involves a consideration of the facts, is conclusive upon us. The case made is not one of mutual mistake. It is one of fraud practiced by the plaintiff's agent upon the defendant's testator, and as the plaintiff is bound by the agent's acts, the case upon this point is brought directly within the decision of this court in *Kilmer v. Smith* (77 N. Y. 226). Other questions are now presented by the learned counsel for the appellant, of which it might be enough to say they are not within the pleadings and, so far as we can see, were not raised in the court below; but they also seem to be without merit.

"First: The appellant claims that if the defendant is under no express covenant to pay the incumbrances or indemnify his grantor against their payment, yet the plaintiff may recover the deficiency paid by him as if the defendant was bound 'to indemnify his grantor against incumbrances.' It is difficult to see how a court of equity could raise such an obligation upon

the conscience of a purchaser whose undertaking is defined by a written contract in terms which exclude the existence of such an obligation, and in whose favor it has been adjudged that an obligation to pay those incumbrances did not exist. To enforce this doctrine would require the defendant to do indirectly what he was under no agreement or duty to do directly. No doubt such a covenant of indemnity is very different from an assumption, by a purchaser, of a sum due upon mortgage and to be paid by him out of the consideration of the sale, but we find nothing in the transaction between these parties from which it can be implied. It is true, as the appellant claims, that the property to be sold by the plaintiff to the testator is described in the contract as 'subject to mortgages amounting to \$12,000,' and the plaintiff agreed to sell the same 'for the sum of \$42,000.' But there come these words, 'which' (that is, the \$42,000) 'the said party of the second part hereby agrees to pay by conveying to the party of the first part certain other real estate,' also described as 'subject to mortgages amounting to \$13,500.' The defendant performed on his part and paid all he undertook to pay. No part of the purchase-money was left in his hands, nor was any money to be paid by him. The whole was to be paid and was paid in land. The defendant took the land *cum onere*, or, as the contract states, 'subject' to the mortgage, but was himself burdened with no obligation to discharge it. (*Hamill v. Gillespie*, 48 N. Y. 556; *Belmont v. Coman*, 22 id. 438.) It would be otherwise and the contention of the appellant should prevail if, as he assumes, the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchasers, or if he retained its amount. Nothing more than this is established by *Dorr v. Peters* (3 Edw. Ch. 132), cited by the appellant.

"Second: It is also urged that the plaintiff should at least have judgment for the interest accruing after May 1, 1872, upon the mortgage. But the same remarks apply here. The purchaser undertook or assumed no payment, and the declaration, that he was 'to assume interest from May 1, 1872, on the aforesaid lots,' was only a limitation upon the vendor's agreement to covenant against incumbrances, and the land became subject to it. (*Belmont v. Coman*, *Hamill v. Gillespie*, *supra*.)

There is no finding which permits a different inference, nor was the trial court asked to find in relation to it."

*Samuel Hand* for appellant.

*Theodore F. Jackson* for respondents.

DANFORTH, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.



ELIZA DACK, Respondent, v. JAMES DACK, JR., et al.,  
Appellants.

The probate of a codicil to a will was contested, both on the ground of want of due execution, and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The General Term, upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate. *Held*, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence.

(Argued March 1, 1881; decided March 15, 1881.)

MEM. of decision below (19 Hun, 630).

James Dack, a resident of Monroe county, died in January, 1877, leaving a will and codicil, and leaving his widow and three children, by a former wife, him surviving. The will gave his estate, real and personal, to his wife for life, remainder to her and his daughter. The daughter having subsequently died, the codicil was executed which gave the estate to his wife absolutely. The will and codicil were presented to the surrogate of Monroe county for probate. This was contested by said children on the ground of undue influence, and that they were not duly executed. The surrogate admitted the will to probate, but rejected the codicil on the ground that it was not duly executed. The General Term reversed the surrogate's decree so far as it refused to admit the codicil to probate, and directed the surrogate to admit it.

The rulings of this court, together with the additional facts upon which they are based, are set forth in the following extract from the opinion.

"The execution of the codicil, rejected by the surrogate but sustained by the General Term, was proved somewhat imperfectly, but not more so than may be fairly explained by the forgetfulness of the attesting witnesses. There is no doubt that the testator perfectly and correctly understood the character of his act. By the will itself, made in 1871, he had given to his wife a life estate in his property, with a remainder over to their daughter Elizabeth; thus excluding from his bounty the children by a former wife who are the contestants here. Elizabeth died in 1875, and the purpose indicated by the will had either to be abandoned, or made effectual by some new devise of the remainder. About three weeks before the execution of the codicil he brought the will to Carpenter, who was a neighbor and a justice of the peace, and after talking about an alteration of the will, finally left it in Carpenter's possession. After the delay mentioned, the testator came again, requested the codicil to be drawn, and dictated its terms; directing that the whole of his property should go to his wife absolutely. The codicil was thereupon drawn, and its execution by the testator and the subscribing witnesses immediately followed. It is very certain, therefore, that Dack well understood the testamentary character of his act and retained his original purpose of excluding his older children from any share in his bounty.

It is objected in substance to the proof of the codicil that there was no sufficient publication of it in presence of the subscribing witnesses. According to the evidence of Carpenter, the testator signed the codicil in his presence before the other attesting witnesses were summoned. These were a son of Carpenter and a hired man, named Rossiter. These two were called in to witness the paper by the elder Carpenter from an adjoining room. The call was in the presence of Dack, loud enough to reach the parties intended, and must be assumed to have been made with his knowledge and consent and was equivalent to a request by him. After they arrived, Dack acknowledged his signature. Both the Carpenters agree in that

and Rossiter, at least, does not contradict it. What further transpired depends mainly upon the testimony of Rossiter. He says that Carpenter "asked Dack if he wanted me to sign the will and Dack said, yes." He says again that he heard Carpenter say, "if he acknowledged this will," and Dack answered yes. The elder Carpenter does not contradict but rather corroborates this statement. When asked the specific question if he inquired of Dack "whether that was his last will or codicil," he replied, "I don't know just how I worded it;" but added afterward, "I don't recollect if I asked him any more than if that was his signature." Taking this evidence all together, and coupled with the conceded fact of the testamentary purpose which brought the testator to Carpenter's, we think there is sufficient evidence of the publication of the codicil. Through all the defects of memory and of testimony it is quite possible to see the presence of the former facts necessary to the due execution of the codicil. (*Coffin v. Coffin*, 23 N. Y. 15.)

"But it is further objected that two of the three witnesses must have signed the attestation clause before the testator signed the codicil, and so the execution was insufficient. (*Jackson v. Jackson*, 39 N. Y. 153; *Sisters of Charity v. Kelly*, 67 id. 409.) The fact is evidently the reverse. The elder Carpenter swears that the codicil was signed before the arrival of the other two witnesses. The son says that before he signed, Dack acknowledged his signature. Rossiter does not contradict this state of facts. He says that after his arrival, Carpenter handed the pen to Dack, but whether at that time Dack made his mark the witness could not tell. There are slight inconsistencies and disagreements in the testimony of the subscribing witnesses, but no material or necessary formality is shown to have been omitted. The attestation clause is full and complete, the signatures are all genuine, the testamentary purpose of the testator and his knowledge of the character of his act are unmistakable, the surrounding circumstances indicate a due execution, and these facts add strength to the evidence of the witnesses, and characterize the details which they are able to narrate. On the whole, we concur in the opinion of the General Term, that there is sufficient proof of the execution of

the codicil. (*Matter of Kellum*, 52 N. Y. 517; *Trustees of Auburn Seminary, etc., v. Calhoun*, 25 id. 425; *Thompson v. Stevens*, 62 id. 635.)

"But another difficulty remains. Both the will and the codicil were attacked upon the ground of undue influence. So far as the will is concerned, the surrogate decided the question adversely to the contestants. As it respects the codicil he only determined that it was not shown to have been duly executed. His final decree plainly distinguishes between the will and the codicil, and disposes of them differently and separately. His conclusion as to the latter, that the proof did not show its due execution, rendered unnecessary a determination upon the further issue of undue influence, and it was therefore left undecided. The conclusion of the General Term, that the codicil was duly executed at once, brought the other issue to the surface and rendered it the vital question remaining. It has not been passed on by the surrogate. We cannot tell what his conclusion in that respect may be. The order of the General Term, therefore, directing him to admit the will to probate has the necessary effect of excluding the defense of undue influence from any consideration by the surrogate. The contestants are left in the situation of having interposed a perfectly valid defense, if in fact true, to the probate of the codicil, and seeing such probate granted without any decision upon the material issue tendered. If there were no material facts bearing upon the free and voluntary action of the testator in making the codicil as distinguished from the will, the error would be immaterial, but very many of the facts relied on occurred after the execution of the will, and the possible argument against the codicil is very much stronger than against the will.\* \* \* The contestants are at least entitled to have the issue decided, and not be beaten with a possible defense entirely undetermined. We are of the opinion, therefore, that the case should go back to the surrogate to be heard upon the question of undue influence as affecting the codicil, and that the order of the General Term should be modified accordingly."

*Wm. F. Cogswell* for appellants.

*Q. Van Voorhis* for respondent.



FINCH, J., reads for modification of judgment of General Term, by remitting case to surrogate to be heard upon the question of fraud and undue influence as affecting the codicil, and for affirmance as thus modified.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

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ELIPHALET W. BLISS, Respondent, *v.* SAMUEL J. HOGGSON,  
Appellant.

*It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the General Term, it is not correct practice for respondent's attorney to return the case, and, upon failure to serve others, to enter order dismissing appeal.

*It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed.

(Argued March 15, 1881; decided March 22, 1881.)

THIS was a motion to vacate an order dismissing the appeal herein, and to restore the case to the calendar.

Notice of appeal to this court was served in October, 1879. On the 16th day of January, 1880, the respondent's attorney served upon appellants notice to serve the printed copies of the case, as required by rule 7 of this court. The cases were served, in pursuance of this notice, on the 26th day of January, 1880, but they were defective in that they did not contain the notice of appeal to this court, the opinion delivered at the General Term, and the judgment entered upon the decision of the General Term; on account of such defects, they were, on the next day after their service, returned to appellants' attorney, and were afterward retained by him, and no other cases were served. On the 30th day of December, 1880, respondent's attorney noticed the cause for argument, and placed the same on the calendar of this court. On the 26th day of January, 1881, the respondent's attorney, upon filing proof of the notice to serve the cases, as above stated, and default in making

such service, entered an order in the clerk's office, under rule 7, dismissing the appeal for want of prosecution. The remittitur was returned to, and filed in, the Supreme Court, and judgment was thereon entered in that court, with costs of the appeal. Thereafter the respondent commenced an action upon the undertaking given upon the appeal; thereupon an order to show cause for this motion was obtained.

The court say: "We think the respondent's practice was wrong. This is not a case where no cases were served under rule 7, but defective cases were served. The respondent's attorney should have moved upon notice to have the cases corrected, or that corrected copies be served, and that in default of such correction the appeal should be dismissed.

"But we have lost jurisdiction of the case, and we will permit this motion to stand over until the appellant can have an opportunity to procure the return of the remittitur to this court; and we request its return upon such terms as the Supreme Court may deem just."

*G. T. Gardiner* for motion.

*H. F. Anderson* opposed.

*Per curiam* opinion for permitting motion to stand over, and requesting court below to return remittitur.

All concur, except RAPALLO, J., absent.

Ordered accordingly.

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HARVEY J. KING, Respondent, v. OSCAR B. ARNOLD, Appellant.

(Argued March 1, 1881; decided March 22, 1881.)

THIS was an appeal from order of General Term, affirming an order which denied a motion to vacate an order of arrest herein.

The motion was made upon the same papers on which the order of arrest was granted.

The court say :

"1. The complaint contains causes of action which authorize an arrest under subdivision 3 of section 550 of the Code.

"2. The facts positively stated in the complaint and affidavit are sufficient to sustain the order of arrest. They were sufficient to give the county judge jurisdiction to grant the order; and with the exercise of his discretion we cannot interfere."

*J. W. Palmer* for appellant.

*LaMott W. Rhodes* for respondent.

*Per curiam* opinion for affirmance.

All concur.

Order affirmed.

HAROLD DOLLNER et al., Appellants, v. WILLIAM LINTZ, Respondent.

(Argued March 10, 1881; decided March 22, 1881.)

THE testimony of Eneas, a witness for defendant, was taken by commission some eighteen months prior to the trial. A witness called by plaintiff to impeach Eneas testified that he had known him intimately for fifteen or eighteen years. He was then asked what is his reputation for truth and veracity. This was objected to on the ground that the question was directed to the reputation of the witness at the time of the trial and not to the time when the commission was executed. The objection was overruled. *Held*, no error. The court say :

"The exception is not tenable for several reasons: First. General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. Proof that the reputation of a witness is now bad might justify the jury, in the absence of countervailing evidence, in inferring, within reasonable limits as to time, that it was bad before the day of the trial. The trial judge may control the range of the inquiry, and it would be for the jury to determine, upon all the circumstances, as to the weight of

the evidence. Second. But another conclusive answer to the exception is, that the witness Henderson, in reply to the question, referred to the reputation of Eneas at and before the time of his examination on commission, and said that his reputation was bad ever since he had known him."

Various other questions were presented upon exceptions to the reception and rejection of evidence, which were disposed of upon the facts.

*Nathaniel C. Moak* for appellants.

*S. H. Thayer* for respondent.

ANDREWS, J., reads for affirmance.

All concur.

Judgment affirmed.

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CHARLES L. BERNHEIM, Appellant, *v.* ALBERT DAGGETT, Sheriff,  
etc., Respondent.

(Argued March 10, 1881; decided March 22, 1881.)

*Lewis Sanders* for appellant.

*B. F. Tracy* for respondent.

Agree to affirm without opinion

All concur.

Judgment affirmed.

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THE ST. VINCENT FEMALE ORPHAN ASYLUM OF THE CITY OF  
TROY, Appellant, *v.* THE CITY OF TROY, Respondent.

(Argued March 14, 1881; decided March 22, 1881.)

*Olin A. Martin* for appellant.

*R. A. Parmenter* for respondent.

Agree to affirm on opinion of BOOKES, J., in court below.

All concur.

Judgment affirmed.

• DAVID K. MCCARTHY, Respondent, v. REBA W. MCCARTHY,  
Appellant.

(Argued March 15, 1881; decided March 22, 1881.)

REPORTED below (16 Hun, 546).

*W. S. Hevenor* for appellant.

*Hiscock, Gifford & Doheny* for respondent.

Agree to affirm without opinion.

All concur.

Order affirmed.

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THE PEOPLE ex rel. ELIZABETH F. FLOYD et al., Appellants, v.  
ROBERT L. PETTY et al., Highway Commissioners, etc., Re-  
spondents.

(Submitted March 15, 1881; decided March 22, 1881.)

*Roe & Macklin* for appellants.

*A. A. Spear* for respondents.

Agree to dismiss appeal without opinion.

All concur.

Appeal dismissed.

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SOLOMON LOEB, Appellant, v. BENJAMIN A. WILLIS, Impleaded,  
etc., Respondent.

(Argued March 15, 1881; decided March 22, 1881.)

*Will Man* for appellant.

*William Settle* for respondent.

Agree to dismiss appeal without opinion.

All concur.

Appeal dismissed.

DAVID NOONAN, Appellant, v. NILES P. SMITH et al., Re-  
 ..... spondents.

(Submitted March 15, 1881; decided March 23, 1881.)

*Moses Ely* for appellant.

*Edward H. Hobbs* for respondents.

Agree to affirm without opinion.

All concur.

Order affirmed.

In the Matter of the Petition of JOHN C. VANDENHREVEL  
 et al. to Vacate an Assessment.

In the Matter of the Petition of EDWARD MORRISON to Va-  
 cate an Assessment.

In the Matter of the Petition of ELIZABETH P. ROBBINS to  
 Vacate an Assessment.

In the Matter of the Petition of JOHNSTON LIVINGSTON to  
 Vacate an Assessment.

In the Matter of the Petition of FREDERICK E. GIBERT to  
 Vacate an Assessment.

In the Matter of the Petition of PATRICK MALONE to Vacate  
 an Assessment.

These cases presented the same questions and were argued  
 and decided with *In re Merriam* (*ante*, p. 596).

JOSEPH AGATE, Appellant, v. HENRY MORRISON, Survivor, etc.,  
 Respondent.

(Argued March 11, 1881; decided March 25, 1881.)

THIS was an action by a lessor against his leasees to recover

damages for alleged injuries to the demised premises. The defendants made extensive alterations, removing partitions, doors, etc. The defendants justified under a clause in the lease giving the lessee "the right to make any inside alterations to said premises as he may think proper, provided the same do not injure the premises."

The case is reported on a former appeal in 57 N. Y. 604.

Upon the second trial certain questions were submitted to the jury as follows :

"Did the removal of the partitions and doors do substantial injury to the premises?"

"Did their removal diminish the pecuniary value of the building?"

"Was their removal a wanton and capricious act?"

"Was it made with reasonable care, in good faith, with the expectations on the part of defendants and for the purpose of making the lease more profitable?"

These questions were objected to by plaintiff's counsel as being incompetent and immaterial to the issue. The answers were all in favor of defendants. *Held*, that the action of the trial court was proper and was in conformity to the views of the appellate court upon the former appeal.

Plaintiff's counsel claimed a right to recover for the value of the materials removed and, as alleged, converted by defendant. No evidence was offered in reference thereto until after the case was in the hands of the defendant. *Held*, that it was in the discretion of the court whether or not to admit it at that time, and that excluding it was no error.

*C. Bainbridge Smith* for appellant.

*Robert H. Griffin* for respondent.

DANFORTH, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

JOHN T. WILSON, Respondent, v. HELEN M. SIMPSON et al.,  
Appellants.

The Supreme Court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here.

(Submitted March 15, 1881; decided March 25, 1881.)

THIS was an appeal from an order of General Term modifying an order of Special Term which denied a motion on the part of defendants to compel plaintiff to enter judgment. The General Term order directed that unless judgment should be entered by plaintiff within ten days after service of the order, defendants have leave to enter judgment in conformity to the decision. *Held*, as above.

*B. F. Blair* for appellants.

*Francis Lynde Stetson* for respondent.

*Per curiam* opinion for dismissal of appeal.

All concur, except RAPALLO, J., absent.

Appeal dismissed.

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CARL WERTHEIM et al., Appellants, v. JOHN B. PAGE et al.,  
Respondents.

(Argued March 15, 1881; decided March 25, 1881.)

*Charles H. Tweed* for appellants.

*David J. H. Wilcox* for respondents.

Agree to dismiss appeal without opinion.

All concur.

Appeal dismissed.



ALBERT W. NICKERSON et al., Respondents, v. EMIL RUGER,  
et al., Appellants.

Plaintiffs, in good faith and without notice of any equities, received from the payee, in exchange for two promissory notes which they surrendered absolutely and unconditionally, a note made by defendants. In an action thereon, *held*, that the plaintiffs were *bona fide* holders for value and so that it was no defense that the note was executed for the accommodation of the payee and had been fraudulently diverted from the use intended.

(Argued March 16, 1881; decided March 25, 1881.)

THIS was an action upon a promissory note for \$3,325 executed by the defendants to one Taylor, dated June 21, 1875, payable four months after date. The defendants claimed that the note was given by them to Taylor, without any value, for a special purpose, that it was wrongfully and fraudulently diverted by Taylor, and that the plaintiffs are not *bona fide* holders for value.

The case is reported on a former appeal in 76 N. Y. 279.

The facts are substantially as follows: Some time prior to June the firm of Lambert & Hitchcock had furnished certain supplies to vessels owned by Taylor, and for such supplies Taylor had given them two notes each for \$1,500. Those notes that firm had indorsed and transferred for value to the plaintiffs. Taylor did not meet them at maturity, and Lambert & Hitchcock obtained from him the note in suit, which he indorsed to them; and they delivered it to the plaintiffs, who in consideration thereof surrendered to them the two notes. The surrender of the notes was absolute and unconditional, the plaintiffs retaining no interest therein. Lambert & Hitchcock retained a lien upon the vessels for the supplies for which the two notes were given, and they obtained the notes from plaintiffs that they might surrender them up and enforce their liens. They subsequently collected some money in the proceedings to enforce such liens, and such money they paid over to the plaintiffs to apply upon the note in suit, and all they paid to the plaintiffs was so applied; plaintiffs' recovery was for the amount of the note, less payments thus made, and less the sum of \$325, the difference between the amount of the note and the two notes surrendered up when plaintiffs took it.

The court say: "This, then, is a case where the plaintiffs took defendants' note in good faith, without any notice of the defendants' equities, and for value parted with at the time; and hence the alleged diversion of the note furnishes no defense."

*Samuel Hand* for appellants.

*John A. Deady* for respondents.

EARL, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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JAMES BIGLER et al., Respondents, v. WILLIAM PINKNEY, Survivor, etc., Appellant.

(Argued March 16, 1881; decided March 25, 1881.)

*Samuel Hand* for appellant.

*E. A. Brewster* for respondents.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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LEON HENNEQUIN et al., Appellants, v. HENRY CLEWS et al., Respondents.

(Argued March 16, 1881; decided March 25, 1881.)

*C. Bainbridge Smith* for appellants.

*J. M. Guiteau* for respondents.

Agree to affirm on authority of decision on former appeal (77 N. Y. 427).

All concur.

Judgment affirmed.

ADOLPH V. TIEDEMANN, Appellant, *v.* WILLIAM G. ACKERMAN,  
Respondent.

(Argued March 17, 1881; decided March 25, 1881.)

REPORTED below (16 Hun, 307).

*Anthony B. Porter* for appellant.

*R. W. Van Pelt* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

MARY E. SNIFFEN, Respondent, *v.* BERNARD KOEHLING, Ap-  
pellant.

(Argued March 21, 1881; decided March 25, 1881.)

*Theodore F. Sanzay* for appellant.

*Cornelius A. Runkle* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

MARY J. MCGRAW, Respondent, *v.* GEORGE N. TATHAM et al.,  
Appellants.

(Argued March 21, 1881; decided March 25, 1881.)

THIS action was brought to recover the balance of an alleged loan to, or deposit with, defendants' firm. The defense was a denial of plaintiff's title, defendants claiming that the money belonged to plaintiff's husband, Joseph McGraw.

The deposits were made by McGraw in his own name. His brother, Hugh, was in defendants' employ. Joseph was permitted to testify under objection and exception that he called upon his brother at defendants' place of business, and told him that, at the request of his wife, he desired to put her money on deposit, intending eventually to buy bonds with it; that Hugh advised him not to purchase bonds, but deposit it with defendants upon interest; that, at Hugh's further suggestion, he went into the back office and saw Charles Tatham, one of the defendants, and then returned to Hugh with whom the business was closed; that Hugh drew a receipt for the money, and took it to said Tatham, in the back office, who inserted a clause specifying the rate of interest, and providing for thirty days' notice before payment, and then signed it, and it was delivered by Hugh to Joseph. *Held*, that the evidence of the conversation with Hugh was properly received as part of the *res gestæ*.

It was proved that before this deposit Joseph McGraw had received from his wife a sum larger than that so deposited, which he deposited to his own credit in a bank. Most of this he drew out from time to time, replacing it with funds of his own before he made the deposit with the defendants; which was done by his delivering to defendants a check upon said bank. *Held*, that it was immaterial from what source the deposit with defendants was derived; that if Joseph made such deposit for his wife, it became hers irrespective of the source.

It was shown upon the trial that Hugh McGraw, claiming to be a creditor of his brother, attached, as the property of the latter, the unpaid balance in defendants' hands. The attachment proceedings were excluded on the ground that no such defense was set up in the answer. *Held*, no error; that so far as the fact of the attachment bore on the question of the interest of plaintiff's husband, sufficient was shown; that defendants, having chosen to defend for the benefit of Hugh, without pleading the attachment, or seeking to compel an interpleader, no question was left open except plaintiff's title.

*J. Treadwell Richards* for appellants.

*Andrew J. Perry* for respondent.

FINCH, J., reads for affirmance.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

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HELENA M. HART, Respondent, v. THE VILLAGE OF PORT  
JERVIS, Appellant.

(Argued March 21, 1881; decided March 25, 1881.)

*Samuel Hand* for appellant.

*John W. Lyon* for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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JOHN H. PULESTON et al., Appellants, v. FRANCIS B. WALLACE  
et al., Respondents.

(Argued March 14, 1881; decided March 25, 1881.)

*Samuel Hand* for appellants.

*S. W. Fullerton* for respondents.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

ANDREW S. WHEELER, Respondent, v. PETER A. YOUNGS,  
Appellants, et al.

(Argued November 19, 1880 ; decided March 25, 1881.)

*Joshua M. Van Cott* for appellant.

*William E. Osborne* for respondent.

RAPALLO, J., reads for reversal.

All concur, except MILLER, J., dissenting, and reading opinion for affirmance.

Judgment reversed.

# INDEX.

## ACTS OF CONGRESS.

1. *It seems* that the right of a debtor of the United States government, when sued by it, to interpose a counter-claim or counter-credits, rests in all cases upon the provisions of the act of Congress granting and regulating it (Act of March 3, 1797, §§ 3 and 4); and while, under said act, a defendant, upon complying with its conditions, may give in evidence any counter-claim he may have in his own right, which is a proper subject of set-off, such counter-claim is available only to the extent necessary to defeat the claim of the government, and no affirmative judgment for any excess can be rendered against it. *People v. Dennison.* 272
2. The provision of the Federal Constitution (art. 4, § 2), requiring the surrender, on demand of the executive authority of a State, of fugitives from justice "charged with treason, felony, or other crimes" who are found in another State, and the provision of the U. S. Statutes giving practical effect thereto (U. S. R. S., 5278), embrace every criminal offense and every act forbidden and made punishable by the law of the State where the act was committed. *People ex rel. Jourdan v. Donohue.* 438

## ADMISSIONS AND DECLARATIONS.

— *Declarations of assignor for benefit of creditors made after delivery of possession under assignment, not competent against the assignee.*  
*See Coyne v. Weaver.* 386

SICKELS — VOL. XXXIX.

## ADVERSE POSSESSION.

1. Plaintiffs having title to land bounded by the waters of a bay at ordinary high-water mark made an allotment, under which defendant claimed, bounded westerly by "the cliff." At the time of the allotment there was a strip of land between the cliff and high-water mark. In an action of ejectment to recover this strip, defendant claimed by adverse possession. It appeared that fences on the sides of defendant's premises, extending across the strip in question to or near low-water mark, had been maintained by him and his grantors for more than twenty years, those portions across the beach being taken away in winter to prevent their being carried away by the ice and tides; there was no fence along the cliff, the land on that side being open to the sea. *Held*, that the evidence was sufficient to authorize the submission to the jury of the question as to whether there was a substantial inclosure within the meaning of the statute. *Trustees, etc., East Hampton v. Kirk.* 215
2. Also *held*, that the fact that defendant and his predecessors in title had gathered sea-weed from the premises, while not alone evidence of adverse possession, was such evidence taken in connection with the fact that they claimed to prevent other freeholders of the town from gathering, and that they did so under claim of exclusive right as owners, which claim was known to plaintiffs. *Id.*
3. It appeared that R., a former owner of defendant's land, brought an

action for trespass against one who had gathered sea-weed upon the beach. R. discontinued the action under an agreement with the town and agreed not to sue again. *Held*, that this did not entitle plaintiffs to a charge to the jury that R. thereby relinquished his adverse possession; that it was at most evidence bearing upon that question for the consideration of the jury.

*Id.*

— *Twenty years' user, under a license, of a drain across the lands of another does not give a prescriptive right to the easement, as the possession is by consent and not adverse.*

*See Wiseman v. Lucksinger.* 81

### ANNUITIES.

1. The old chancery rule construing testamentary gifts of fixed sums by way of annuities payable out of rents and profits, as authorizing the taking of a sufficient sum from the body of the estate to make up a deficiency, stated to have been modified, so that in such cases the intention of the testator is to be ascertained and effect given to it. *Delaney v. Van Aulen.* 16

### APPEAL.

1. This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them in fraud of the rights of the lunatic. *Held*, that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character; and that an order of reference was not reviewable here. *Harrington v. Bruce.* 103

2. Judgment was rendered in this action upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general on appeal to this court gave the required stipulation for judgment absolute. *Held*, that this was not an assent to an affirmative judgment on a counter-claim set up in the answer; that it waived no legal objection to the counter-claim, or immunity of the State from such a judgment. *People v. Dennison.* 272

3. Upon the trial of an action there was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached. *Held*, that there was no exception bringing the error, if any, to the notice of this court. *Devlin v. Cooper.* 410

4. Where plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal. *Southwick v. First Nat. Bk.* 420

5. Where a summons was served upon a sheriff by delivery to his deputy at his office, *held*, that an omission to prove the filing of notice on the trial, if required, was cured by the bringing of the notice to the General Term, on appeal from judgment against the sheriff. *Dunford v. Weaver* 445

6. An omission in proof matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed. *Id.*

7. *It seems* that, assuming the court has power in a foreclosure suit to compel the owner of the equity of



- redemption to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. *Rider v. Bagley*. 461
8. So, also, where fraud or contempt upon the Supreme Court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. *Id.*
9. Where, upon motion to vacate an order for examination in supplementary proceedings for the collection of a tax, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting; held, that the question was not reviewable here. (Code of Civil Procedure § 1337.) *Bassett v. Wheeler*. 466
10. Where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. *First Nat. Bk. of M. v. Fourth Nat. Bk.* 469
11. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed an exception should be taken. *Muldoon v. Blackwell*. 646
12. The allowance of costs in the Supreme Court in an equity action, and whether to one or more respondents, is in the discretion of the court below, and its decision is not reviewable here. *Van Gelder v. Van Gelder*. 658
13. The probate of a codicil to a will was contested, both on the ground of want of due execution, and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The General Term upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate. Held, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence. *Dack v. Dack*. 663
14. It seems, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the General Term, it is not correct practice for respondent's attorney to return the case, and upon failure to serve others, to enter order dismissing appeal. *Bliss v. Hoggson*. 667
15. It seems, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and in default of such correction, that appeal be dismissed. *Id.*
16. The Supreme Court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here. *Wilson v. Simpson*. 674
- When order directing a bill of particulars not appealable. See *Dwight v. G. L. Ins. Co.* 493
- An order involving a question of jurisdiction reviewable here. See *Blossom v. Estes*. 615
- Upon reversal on the facts on appeal to General Term from decree of surrogate of county of New York, establishing lost or destroyed will, it is proper to remit proceedings to surrogate, and costs should be awarded against respondent. See *Sheridan v. Houghton*. (Mem.) 643

— *A justice of the Supreme Court who has confirmed report of referees in reference, under the statute, of disputed claim against estate, disqualified by State Constitution (Art. 6, § 8) from sitting at General Term in review of decision.*

*See Duryea v. Traphagan. (Mem.)*  
652

— *The point that in action on lost note, bond required by statute was not given, cannot be raised for first time on appeal, it must be presented by exception.*

*See Fordham v. Hendrickson. (Mem.)*  
654

— *Order granting order of arrest not reviewable here where papers stated facts to give jurisdiction.*

*See King v. Arnold. (Mem.)* 668

— *When plaintiff fails to offer evidence on point at issue until after he rests, it is in discretion of court whether to admit it, and its action is not reviewable here.*

*See Agate v. Morrison. (Mem.)* 672

#### APPEARANCE.

1. A guardian *ad litem* can only be regularly appointed for an infant defendant under the age of fourteen after service of summons personally or by the substituted mode of service prescribed. *Ingersoll v. Mangam.* 622

2. An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the Code (§ 424) which provides that such an appearance shall be equivalent to personal service of the summons. *Id.*

#### ARREST.

1. *It seems* public policy requires that officers armed with bailable process for the arrest of defendants should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements. *Toles v. Adee.* 222

2. *It seems* also the fact, that, under our practice, bail taken by a sheriff on discharging a defendant from arrest stands in some sense both as bail to the sheriff and bail to the action, does not affect the application of the statute making void obligations taken *colore officii* in any other case or manner than as provided by law (2 R. S. 286, § 59) when the undertaking contains conditions not prescribed by law; nor is it in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality. *Id.*

3. *It seems* also the validity of the security is not dependent upon the question whether it was voluntarily given or was extorted by actual duress and oppression. *Id.*

4. Where, however, the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (§ 183), the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said Code (§ 187), did agree, at defendant's solicitation, to take to plaintiff's attorneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the Code, and in the meanwhile should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed, *held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that so considered it became operative and binding, though not as a statutory obligation. *Id.*

— *Sufficiency of order of discharge under insolvent act.*  
*See Devlin v. Cooper.* 410

— *Sufficiency of papers to give jurisdiction to grant order of arrest.*  
*See King v. Arnold. (Mem.)* 668

ASSESSMENT AND TAXATION.

1. Where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation, *held*, that such real estate was not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act. *Roosevelt Hospital v. Mayor, etc.* 108
2. In an action to vacate such an assessment, imposed in 1873, it appeared that the land had been assessed for the purposes of taxation in 1866, at which time it belonged to plaintiff. *Held*, that this was a sufficient basis for an assessment within the provision of the act of 1840 (§ 7, chap. 336, Laws of 1840), prohibiting an assessment for a local improvement exceeding half the value of the property as valued by the general tax assessing officers. *Id.*
3. The assessment was for the construction of a sewer. It appeared that a general plan of sewerage for the district had been adopted and a map had been filed as prescribed by the act of 1865 (§ 2, chap. 881, Laws of 1865), upon which map the sewer in question did not appear. *Held* (RAPALLO and EARL, JJ., dissenting), that this alone did not vitiate the assessment; that when the needs of a district or any part of it, after a plan had been so adopted, required another sewer, the construction of it was authorized by the provision of said act (§ 4) permitting "such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue, or part thereof, in said district, or otherwise;" that to invalidate the assessment it must be shown, either that the sewer does not accord in its characteristics with the general plan, or that there has been no general plan devised, mapped and filed. *Id.*
4. It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1867 (chap. 361, Laws of 1867) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted. *Bassett v. Wheeler.* 466
5. The intent of the provision of the New York city charter of 1873 (§ 91, chap. 335, Laws of 1873), requiring contracts for work and supplies to be founded on sealed proposals and given to the lowest bidders was to require a submission for competition of every important item of a contemplated work. *In re Merriam.* 596
6. Where in the advertisement for proposals for constructing a sewer a price was fixed for rock excavation which constituted a large portion of the work, *held*, that this was a violation of the charter, and that an assessment for the work was so far void. *Id.*
7. But *held* that such error furnished no ground for vacating the whole assessment; that a case was presented for a deduction of the objectionable item as authorized by the act of 1870 (§ 27, chap. 383, Laws of 1870). *Id.*
8. The provision of said act of 1870, allowing the modification of assessments by making such deductions was not repealed by the act of 1874 (chap. 812, Laws of 1874), in relation to taxes and assessments in said city. *Id.*
9. The onus of establishing a substantial error in an assessment devolves upon the party making objection thereto and must be proved by affirmative evidence. *Id.*
10. Accordingly *held*, that an objection that the entire cost of the work was assessed when no more than one-half thereof was assessable upon adjacent property under the act of 1865 (§ 8, chap. 565, Laws of 1865), could not be entertained in the absence of proof of what

was the entire cost of the work ; that it could not be presumed, in the absence of evidence to establish it, that more than one-half of the expense was assessed. *Id.*

11. *It seems* that said act of 1865 has reference to the laying out of streets, not to the construction of sewers. *Id.*

12. Also *held*, that an objection that the assessment was illegal because made up and notice published by three of the assessors, not by the full board, was not tenable in the absence of proof that all four were not present, or that the fourth did not have notice of the meeting, or that a vacancy, which had been occasioned by the death of one of the assessors, had been filled at the time of the assessment. *Id.*

13. So, also *held*, that proof that a member of the board of revision was absent did not sustain the objection that the assessment was not legally confirmed. *Id.*

14. The provision of the National Guard Act of 1870 (§ 253, chap. 80, Laws of 1870), entitling a member of the National Guard to an exemption from the assessed valuation of his property to the amount of \$1,000, during the period of his military service, was repealed by its omission from the section as amended in 1875 (§ 59, chap. 223, Laws of 1875). *People ex rel. Sears v. Board of Assessors.* 610

15. No contract relation existed between the State and a member of the National Guard who had enlisted prior to the passage of the repealing act and whose term of service had not then expired, which would prevent it from taking effect as to him ; he enlisted subject to the right of the State at any time to modify or repeal the exemption, and upon the repeal his right to the exemption, as to all subsequent assessments, ceased. *Id.*

16. An omission to award damages as prescribed by the act of 1852 (§ 3, chap. 52, Laws of 1852), for injuries sustained by reason of a change

of the grade of a street in the city of New York, is not a "substantial error" in an assessment for the work within the meaning of the act (chap. 338, Laws of 1858, as amended by chap. 312, Laws of 1874), authorizing the vacating of assessments for such errors. *In re Cruger.* 619

17. An objection that the assessors acted on an erroneous principle in making the assessment is not tenable ; it is a matter of judgment on their part, and an error, if any, is not an error in the proceedings and is not a subject for review under the statute. *Id.*

18. So, also, an objection that the area of assessment for benefit was too small is untenable, as that matter is committed to the assessors and the board of revision, and the exercise of their discretion in this respect cannot be reviewed on such motion. *Id.*

#### ASSIGNMENT.

1. The will of W. gave his money and securities remaining after payment of debts, etc., one-half to his son E., one-fourth to his daughter J., and one-fourth to E. in trust, to pay the interest annually to the testator's son W. during life, and after his death the same to be divided equally among his children if he left any him surviving ; if he left no child or children him surviving, then the one-fourth was given to E. and J., in equal proportions. The testator's son W. died leaving no issue. In an action brought by J. to recover her portion of the trust estate, it appeared that after the death of the testator, the three children met together, settled and set apart the amount of the trust fund, and E., as trustee, received the securities and money so set apart, and as the referee found "as part of the agreement for the final settlement of the affairs of the estate and the division of its assets," J. and E. executed and delivered to their brother W. an instrument in writing, whereby, for the expressed

consideration of one dollar, they did "jointly and severally release, discharge and convey" unto him all their "right, title and interest claim and demand of, in and to the trust fund given and bequeathed" by the will of their father. *Held*, that the finding showed a good and sufficient consideration for the instrument; and that it was valid and effectual to transfer plaintiff's interest in the trust fund. *Ham v. Van Orden.* 257

2. Also *held*, that even had there been no consideration, the instrument having been executed, as was found, voluntarily and without fraud, was valid as a gift. *Id.*

3. Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of the mortgagor that there is no legal or equitable defense to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has been accepted, from disputing such statements. *Smyth v. Munroe.* 354

4. An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this State. *Hibernia Nat. Bk. v. Lacombe.* 367

5. This action was brought upon a judgment obtained in the State of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. K. G. & Co. That action was brought by the members of the firm, as stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. It appeared that said firm was indebted to plaintiff and that there was an understanding between them that he should have the benefit of the policy; that after the loss, in pursuance of such understanding, the policy was sent to

him by the firm to collect and apply proceeds upon his claim, together with an order upon defendant, expressing a consideration, requesting it to pay the amount to plaintiffs, and stating that his receipt would be a full discharge. *Held*, that the order was virtually an assignment transferring the policy; also that the understanding and delivery of the policy in pursuance of it operated as a valid transfer. *Greene v. Republic F. Ins. Co.* 572

— *Record of assignment of mortgage, constructive notice to subsequent purchasers of mortgaged premises.*  
*See Smyth v. K. L. Ins. Co.* 589

— *When foreclosure judgment has been assigned as security for usurious loan, and mortgaged property sold under judgment, assignment void, and judgment setting it and all subsequent proceedings under judgment aside proper.*  
*See Wyeth v. Braniff.* 627

# ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. An assignment for the benefit of creditors contained a clause empowering the assignee to collect the "choses in action with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." In an action by the assignee to recover assigned property levied upon by defendant as sheriff by virtue of executions against the assignor, *held*, that the clause was to be construed as simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust required; that as so construed, the clause was not in conflict with the provision of the act of 1877, in relation to such assignments (§ 23, chap. 466, Laws of 1877), which permits the County Court to authorize an assignee to compromise any claim or debt belonging to the estate; and that it did not invalidate the assignment. *Coyne v. Weaver.* 386

2. Also *held*, that evidence of the declarations of the assignor, made after the assignment, acceptance and delivery of possession under it, were properly excluded. *Id.*
3. A general assignment for the benefit of creditors authorized the assignee to "collect the notes, accounts and choses in action and the taking the part of the whole when the party of the second part (the assignee) shall deem it expedient to do so." In an action by the assignee for the conversion of a portion of the assigned property, *held*, that said provision, literally construed, simply authorized the assignee to receive payment by installments, not to satisfy a debt on payment of a portion; but even if the effect was to give power to compromise it did not invalidate the assignment. *McConnell v. Sherwood*. 522
4. The assignment authorized the assignee "to compromise with the creditors" of the assignor for all his debts and liabilities if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor. *Held*, that the effect and intent of this provision was to the payment of debts and to create a trust for the assignor and so it rendered the assignment void. (2 R. S. 135, § 1; *id.* 137, § 1.) *Id.*
2. Accordingly, *held*, where, a judgment in favor of an attachment debtor was attempted to be attached by service of a copy of the warrant upon one of the attorneys for said debtor, in the action wherein said judgment was rendered, that the attachment was not properly executed; and that a purchaser at sheriff's sale under execution and order of the court in the attachment suit acquired no title. *Id.*
3. It seems that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor. *Id.*
4. The plaintiff, a National bank organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that, under and within the meaning of the provision of the Code of Procedure (§ 427), providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident; that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action. *Hibernia Nat. Bk. v. Lacombe*. 867

#### ASSOCIATIONS.

1. An association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. *Wachtel v. Noah, etc., Soc.* 28
2. It seems that in the absence of any agreement by the members or any provision in the charter or by-laws for a different mode of service, notice should be served personally. *Id.*

#### ATTACHMENT.

1. An attorney for the successful

5. After the delivery of the draft to plaintiff, the M. & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property. *Held*, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment. *Id.*
6. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (3 R. S. 231, § 6, sub. 4.) *Dunford v. Weaver.* 445
7. It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed. *Id.*
8. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*. *Id.*
9. Where a sheriff is sued for an escape from custody under such an attachment, the plaintiff is entitled to recover the damages sustained by him (Code of Civil Procedure, § 158), to wit: the sums awarded to him by the surrogate's decree, with interest from its date. *Id.*
10. The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial. *Held*, that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provision of the Code of Civil Procedure (§ 158) in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. *Id.*
11. In such an action the fact of the insolvency of the debtor is no defense. *Id.*
12. The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which on payment were assigned to plaintiff. *Held*, that this was not a payment and extinguishment of the claims. *Id.*
13. Two attachments were issued by the surrogate and arrests made before said Code went into effect; the escape occurred thereafter; it was claimed that the provision of the Code did not apply. *Held* untenable, as the cause of action was, not the issuing of process and arrest, but the escape. *Id.*
14. The right to an attachment having been conferred by statute is limited by its provisions. *Blossom v. Estes.* 614
15. Under the provisions of the Code of Procedure (§ 227), as amended by section 6, chapter 723, Laws of 1866, declaring that for the purposes of an attachment an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and, upon omission so to do, the jurisdiction which attached on granting the warrant ceased. *Id.*
16. An attachment rendered void by failure to serve or publish summons within the time specified was not revived and validated by the appearance of the defendant in the action. *Id.*

17. An order vacating an attachment because of such failure, as it involves simply a question of jurisdiction, is reviewable here. *Id.*

#### ATTORNEY.

1. An attorney for the successful party in an action by whom a judgment was procured is not an "individual holding such property" within the meaning of the provision of the Code of Procedure (§ 235), authoring the execution of an attachment by service of a copy. *In re Flandrou.* 1
2. The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment. *Root v. Wright.* 72
3. Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule prohibits him from testifying to such communications in an action between his clients and a third person. *Id.*

#### BAIL.

1. *It seems* public policy requires that officers armed with bailable process for the arrest of defendants should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements. *Toles v. Adee.* 222
2. *It seems* also the fact, that, under our practice, bail taken by a sheriff on discharging a defendant from arrest stands in some sense both as bail to the sheriff and bail to the action, does not affect the application of the statute making void obligations taken *colore officii* in any other case or manner than as provided by law (2 R. S. 286, § 59)

when the undertaking contains conditions not prescribed by law; nor is it in the power of the plaintiff afterward to adopt the act of the sheriff and thereby avoid the effect of the illegality. *Id.*

3. *It seems* also the validity of the security is not dependent upon the question whether it was voluntarily given or was extorted by actual duress and oppression. *Id.*
4. Where, however, the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (§ 183), the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said Code (§ 187), did agree, at defendant's solicitation, to take to plaintiff's attorneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the Code, and in the meanwhile should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed, *held*, that the undertaking when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that so considered it became operative and binding, though not as a statutory obligation. *Id.*
5. Bail are sureties with the rights and remedies of sureties in other cases. *Id.*

#### BANKS AND BANKING.

1. The firm of R. Bros., ship brokers, having become embarrassed in business caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff.



iff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted to plaintiff. In an action to recover the amount so retained, *held*, that defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the benefit of those for whom the moneys were received. *Falkland v. St. N. National Bk.* 145

2. Also *held*, that it was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiff. *Id.*

3. Also *held*, that it was immaterial that defendant was not notified that said intestate so held the funds in trust; that the deposits being in his name he was under no obligation to give notice that others had an interest therein. *Id.*

4. Also *held*, that the discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against the firm, did not deprive those for whom the funds were deposited of their right thereto. *Id.*

5. The L. & I. Co. by its charter (§ 5, chap. 730, Laws of 1871) is authorized to "advance moneys \* \* \* upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced. *Duncomb v. N. Y., H., & N. R. R. Co.* 190

6. When forged checks have been paid by a bank, charged in the de-

positor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud; at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger. *Frank v. Chemical Nat. Bk.* 209

7. Where, therefore, checks forged by plaintiffs' confidential clerk, who filled out their checks and had charge of their bank account, were paid by defendant, charged to plaintiffs in their pass-book, the book balanced and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the pass-book was written up and vouchers returned, and the clerk by abstracting the forged vouchers, and by false balances and readings, prevented the forgeries from being discovered, *held*, that plaintiffs were not estopped from questioning the accuracy of the account; and that defendant was liable for the balance, deducting the forged checks. *Id.*

8. Where a married woman is the owner of stock, of a bank located in a State other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile. *Graham v. First Nat. Bk. Norfolk.* 393

9. E., a married woman domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter State the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the

controlling agent; with these banks the Virginia bank had accounts kept in the name of the husband as cashier; by his direction or with his assent various dividends declared upon said shares of stock were paid to said banks or credited in their accounts and allowed them on settlement. In an action by assignees of the wife to recover the dividends, *held*, that the evidence

justified a finding of payment of the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability. *Id.*

— *Deposit by husband in name of wife belongs to her.*

See *McGraw v. Tatham.* (Mem.) 677

See NATIONAL BANKS.  
SAVINGS BANKS.

#### BANKRUPTCY.

1. The firm of R. Bros, ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. *Held*, that the discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against them, did not deprive those for whom the funds were deposited of their right thereto. *Falkland v. St. N. Nat. Bk.* 145

#### BENEVOLENT, CHARITABLE, SCIENTIFIC AND MISSION- ARY ASSOCIATIONS.

1. One of defendant's by-laws provided for giving written notice to any member in arrears six months for dues, calling his attention to the fact that he will be stricken from

the roll in case he does not pay his dues. Another by-law imposed a fine for an omission of a member to give notice to the association of a change of residence. At the time of joining, plaintiff's intestate gave notice of his then place of residence; he subsequently changed his residence but did not give notice. Because of failure to pay his dues he was struck from the rolls. No notice was given him as provided by the by-laws. In an action brought to recover the sum provided by defendant's by-laws to be paid on the death of a member, *held*, that plaintiff was entitled to recover; that the omission of the deceased to give notice of change of residence was no excuse for a failure to give him the prescribed notice. *Wachtel v. Noah, etc., Soc.* 28

2. Where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation, *held*, that such real estate was not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act. *Roosevelt Hospital v. Mayor, etc.* 108
3. The will of McC. gave to his executors \$32,000 in trust to invest and pay the interest to "the New York Home for the Blind, of 219 West Fourteenth street, so long as that institution shall maintain and care for William Gordon, now an inmate of that institution," and in case he was so cared for and maintained during his life, at his death the principal was to be paid to said institution; in case it ceased "to exist or to maintain an institution suitable for the care of the blind" during the life of Gordon, then the income was to be paid to any other society who would maintain and care for him which he might select, the principal to be paid to the society maintaining and caring for him at the time of his death. At the time the will was executed Gordon was an inmate of the institution maintained at 219 West Fourteenth street by defendant—the Society for the Relief of the De-

titute Blind; but before the death of the testator, Gordon was expelled for violation of the rules of the institution; after such death, however, upon learning of the provisions of the will, the society offered to care for and maintain him in its institution or elsewhere; this he refused; he selected the defendant, The St. Joseph's Home, which has since cared for and maintained him. In an action for a construction of the will, *held*, that the bequest was valid and the said society was entitled to it if willing to conform to the conditions imposed; that the expulsion of Gordon prior to the death of the testator did not affect its right after his death; and, it having offered to perform the condition, was entitled to the legacy, its right not being affected by Gordon's refusal of the offer. *Livingston v. Gordon.* 136

— *Validity of bequests to*  
*See Livingston v. Gordon.* 136

#### BILLS, NOTES AND CHECKS.

1. When forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud; at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger. *Frank v. Chemical Nat. Bk.* 209
2. The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid and he is notified, he becomes absolutely bound to pay the amount at the place named. *Liberia Nat. Bk. v. Lacombe.* 367
8. The rights of the parties, therefore, are to be governed by the laws of the place of payment. *Id.*

4. The plaintiff, a national bank, organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that, under and within the meaning of the provision of the Code of Procedure (§ 427), providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident; that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action. *Id.*

5. After the delivery of the draft to plaintiff, the M. & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property. *Held*, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment. *Id.*

6. Where a bill of exchange is paid to one who holds it in good faith and for value, he cannot be called upon to account for the money paid, upon proof that in transactions between the drawer and drawee, of which he had no knowledge or means of knowledge, there has been some fraud or mistake to the injury of the drawee; and this, although the holder, not having parted with value at the time when he took the draft, could not have enforced it against the drawee,

even after acceptance. *Southwick v. First Nat. Bk.* 430

7. This rule is based upon principles of public policy. *Id.*

8. In March, 1873, T., of the firm of S., T. & Co., doing business at Memphis, drew his draft upon that firm, payable to the order of J. N. M. & Son, a Boston firm. The draft was accepted by the drawees, payable at Memphis in forty days. The holder sent the draft to Memphis for collection. Before it fell due the drawees notified the payees that they would not be able to meet it, and requested permission to draw for the amount. Permission was granted by telegram to draw at sight to pay said draft. S., T. & Co. thereupon drew upon J. N. M. & Son a sight draft for the amount. This draft was discounted by defendant, and with the assent of the drawers the proceeds were placed to their credit, their account with defendant being at that time overdrawn to more than the amount. J. N. M. & Son accepted the new draft on presentation, and subsequently paid it. S., T. & Co. drew a check on defendant to pay the old draft which it refused to honor, and refused to pay said draft when presented. S., T. & Co. soon after became insolvent. In an action to recover the amount of the new draft it was not alleged nor was it proved, that a demand or offer to return the draft was first made, or that defendant had any knowledge of the telegram, or the purpose for which J. N. M. & Son authorized the drawing of the new draft. The court directed a verdict for plaintiff. *Held*, error; that neither a cause of action for a conversion of the draft, nor one to recover back moneys paid by mistake, was established. *Id.*

9. The complaint alleged that defendant was notified of the purpose for which the new draft was authorized to be drawn; that it received it, agreeing to collect and apply the proceeds for that purpose, but that it refused so to do. *Held*, that the court erred in denying a motion for a nonsuit, as

plaintiff failed to prove the cause of action alleged in the complaint. *Id.*

10. *It seems*, that had the complaint been sufficient, and had a proper demand been made, plaintiff would not have been entitled to recover. *Id.*

11. Plaintiffs, in good faith and without notice of any equities, received from the payee, in exchange for two promissory notes which they surrendered absolutely and unconditionally, a note made by defendants. In an action thereon, *held*, that the plaintiffs were *bona fide* holders for value and so that it was no defense that the note was executed for the accommodation of the payee and had been fraudulently diverted from the use intended. *Nickerson v. Ruger.* 675

— *Sufficiency of consideration for promissory note.*

*See First Nat. Bk. v. Tisdale.* (Mem.) 655

#### BILL OF PARTICULARS.

1. The power of the Supreme Court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff as of the defendant. *Dwight v. Germania L. Ins. Co.* 493
2. The word "claim" in the provision of the Code of Civil Procedure (§ 581) providing that the court may "in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party," includes not merely a ground or cause of action upon which some affirmative relief is asked, but also, in case of a defendant, whatever is set up by him, based upon facts alleged as the reason why judgment should not go against him. *Id.*
3. The said provision does not take away the power the court previously had of affixing a disability to disobedience of an order directing a bill of particulars. *Id.*

4. In an action upon a policy of life insurance certain breaches of warranty in answering untrue questions in an application were set up as a defense, to wit, that the insured stated that he had made no other application for insurance which had been refused, whereas he had made such applications to companies unknown to defendant; also that he had not had bronchitis or spitting of blood, when in fact he had had both prior to the application; also that he had other insurance on his life in addition to those specified by him. The court, on motion for a bill of particulars, directed defendant to deliver to plaintiff's attorney a statement of the particular times and places at which it expected to prove that the insured had bronchitis and spitting of blood, also stating what other insurance in addition to those specified the defendant expects or intends to prove the insured had, specifying the name of the company and the date and amount of the policy; also stating what applications for insurance were made which had not led to an assurance, specifying name of company, time when application was made, and date of application. The order also provided that defendant should be precluded from giving evidence on the trial of matter not specified in such bill of particulars. The General Term modified the order so as to allow defendant to give in evidence general admissions and declarations of the insured without regard to the bill of particulars. *Held*, that the court had power to grant such an order; and that the granting of it in this case was not such an abuse of discretion as to authorize a review of it in this court. *Id.*

5. The affidavits upon which the motion was made stated that plaintiffs do not know to what instances the said averments of the answer refer, but did not state that they do not know of some instances of the kind referred to. It was claimed that these allegations were not sufficient to authorize the court to entertain the

motion. *Held*, untenable; that the affidavits made a case for the exercise of the discretion of the court. *Id.*

# BONA FIDE HOLDER.

1. Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. At that time they had in their hands of the purchase-price of the exchange more than the value of the corn. In an action for the conversion of the corn, the defense was that defendants bought and paid for the corn in good faith without notice; *held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiffs' demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a

portion of the purchase-money before notice of plaintiffs' claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment. *Dows v. Kidder*. 121

2. Where a bill of exchange is paid to one who holds it in good faith, and for value, he cannot be called upon to account for the money paid, upon proof, that in transactions between the drawer and drawee, of which he had no knowledge, or means of knowledge, there has been some fraud or mistake to the injury of the drawee; and this, although the holder, not having parted with value at the time when he took the draft, could not have enforced it against the drawee, even after acceptance. *Southwick v. First National Bk.* 420

3. This rule is based upon principles of public policy. *Id.*

4. There can be no *bona fide* holder of town bonds, within the meaning of the law, applicable to negotiable paper, as they can only be issued by virtue of special authority, conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute. *Cagwin v. Town of Hancock*. 532

5. All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and, in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith does not preclude the town from showing that they were illegally issued. *Id.*

6. Plaintiffs, in good faith and without notice of any equities, received from the payee, in exchange for two promissory notes which they surrendered absolutely and unconditionally, a note made by defendants. In an action thereon, *held*, that the plaintiffs were *bona fide*

holders for value, and so that it was no defense that the note was executed for the accommodation of the payee, and had been fraudulently diverted from the use intended. *Nickerson v. Ruger*. 675

## BONDS.

— *Rights of parties holding bonds of railroad corporation on foreclosure of mortgage securing the bonds.*

*See Duncomb v. N. Y. H. & N. R. R. Co.* 90

*See TOWN BONDING*

## BOUNDARIES.

1. Plaintiffs having title to land bounded by the waters of a bay at ordinary high-water mark made an allotment under which defendant claimed, bounded westerly by "the cliff." At the time of the allotment there was a strip of land between the cliff and high-water mark. In an action of ejectment, *held*, that this strip was not embraced in the allotment; but that the boundary by the cliff was not a shifting one so as to entitle plaintiffs to make reprisals out of the allotted lands for land lost by the advance of the sea; and that, as between them and the grantees, the site of the cliff at the time of the allotment continued to be the western boundary, and if the strip then intervening between it and high-water mark and a portion of the cliff had subsequently been worn away by the action of the sea, so that the present high-water mark was within the boundaries of the allotted land, plaintiffs had no title. *Trustees, etc., East Hampton v. Kirk*. 215

## BRIDGE COMPANIES.

— *What competent evidence in action against, for negligence.*

*See Hart v. H. R. Bridge Co.* 56

## CALENDAR.

1. An action for an accounting and partition and other relief is not en-

titled to a preference because the construction of a will is incidentally involved therein. *Peyser v. Wendt*. 642

2. To give a cause a preference under the Code of Civil Procedure (§ 791, subd. 5), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. *Id.*

CASE.

1. *It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the General Term, it is not correct practice for respondent's attorney to return the case, and, upon failure to serve others, to enter order dismissing appeal. *Bliss v. Hoggson*. 667
2. *It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

- Delaney v. Van Aulen* (Mem. 21 Hun, 274) reversed. *Delaney v. Van Aulen*. 16
- Wetmore v. White* (2 Cal. Cas. 87), distinguished. *Wiseman v. Luck-singer*. 39
- Brown v. Bowen* (30 N. Y. 541), distinguished. *Wiseman v. Luck-singer*. 39
- Rindge v. Baker* (57 N. Y. 209), distinguished. *Wiseman v. Luck-singer*. 39
- Pierrepoint v. Barnard* (6 N. Y. 804), distinguished. *Wiseman v. Luck-singer*. 39
- Miller v. A. & S. R. R. Co.* (6 Hill, 63), distinguished. *Wiseman v. Luck-singer*. 39

*Wolfe v. Frost* (4 Sandf. Ch. 93), distinguished. *Wiseman v. Luck-singer*. 39

*Sibley v. Ellis* (11 Gray, 417), distinguished. *Wiseman v. Luck-singer*. 43

*Ward v. Warren* (82 N. Y. 275), distinguished. *Wiseman v. Luck-singer*. 46

*La Frombois v. Jackson* (8 Cow. 589), distinguished. *Wiseman v. Luck-singer*. 46

*Briggs v. Prosser* (14 Wend. 227), distinguished. *Wiseman v. Luck-singer*. 46

*Ashley v. Ashley* (4 Gray, 197), distinguished. *Wiseman v. Luck-singer*. 46

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*Woodward v. M. S. & N. I. R. R. Co.* (10 Ohio St. 121), distinguished. *Leonard v. Columbia St. Nav. Co.* 54

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*Allen v. P. & C. R. R. Co.* (45 Md. 41), distinguished. *Leonard v. Col. St. Nav. Co.* 55

*Selma R. & D. R. R. Co. v. Lacy* (43 Ga. 461), distinguished. *Leonard v. Columbia St. Nav. Co.* 55

*Marcy v. Marcy* (32 Conn. 308), distinguished. *Leonard v. Columbia St. Nav. Co.* 55

*McCosker v. L. I. R. R. Co.* (21 Hun, 500), reversed. *McCosker v. L. I. R. R. Co.* 77

*Boone v. Citizens' Sogs. Bk.* (21 Hun, 235), reversed. *Boone v. Citizens' Sogs. Bk.* 83

*Martin v. Funk* (75 N. Y. 184), distinguished. *Boone v. Citizens' Sogs. Bk.* 86

- Denike v. Harris* (28 Hun, 213), reversed. *Denike v. Harris*. 89
- In re Van Antwerp* (56 N. Y. 261), distinguished. *Roosevelt Hospital v. Mayor, etc.* 113
- Harvard College v. Aldermen, etc.* (104 Mass. 470), distinguished. *Roosevelt Hospital v. Mayor, etc.* 113
- DeMott v. Starkey* (3 Barb. Ch. 403), distinguished. *Dows v. Kidder*. 135
- Weaver v. Barden* (49 N. Y. 286), distinguished. *Dows v. Kidder*. 135
- M. & T. Nat. Bk. v. Crow* (60 N. Y. 85), distinguished. *Dows v. Kidder*. 135
- Falkland v. St. Nicholas Nat. Bk.* (21 Hun, 450), reversed. *Falkland v. St. Nicholas Nat. Bk.* 145
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- Kent v. Quicksilver M. Co.* (78 N. Y. 184), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
- Coles v. Bk. of England* (10 Ad. & El. 437), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
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- Stafford v. Storrord* (1 DeG. & J. 193), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
- Nichols v. Gilson* (3 Atk. 573), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
- Currie v. Gould* (2 Mad. Ch. 426), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
- Matthews v. G. N. R. R. Co.* (5 Jur. [N. S.], part 1, 284, 290), distinguished. *Boardman v. L. S. & M. S. R. Co.* 184
- Cosgrove v. N. Y. C. & H. R. R. R. Co.* (18 Hun, 329), distinguished. *Masterson v. N. Y. C. & H. R. R. R. Co.* 254
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- Walton v. Walton* (1 Keyes, 18, 2 Abb. Pr. [N. S.] 428), distinguished. *McCabe v. Fowler*. 320
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- Riggs v. Am. Tract Soc.* (19 Hun, 481), reversed. *Riggs v. Am. Tract Soc.* 330
- Ormiston v. Olcott* (22 Hun, 270), reversed. *Ormiston v. Olcott*. 339
- Waters v. Riley* (1 Harr. & Gill. 305), disapproved. *Johnson v. Harvey*. 365
- Tobias v. Rogers* (13 N. Y. 66), distinguished. *Johnson v. Harvey*. 366
- Adams v. Davidson* (10 N. Y. 309), distinguished. *Coyne v. Weaver*. 393
- Southwick v. First Nat. Bk. of Memphis* (20 Hun, 349), reversed. *Southwick v. First Nat. Bk. of Memphis*. 420
- Comstock v. Hier* (73 N. Y. 269), distinguished. *Southwick v. First Nat. Bk. of Memphis*. 433
- First Nat. Bk. of Meadville v. Fourth Nat. Bk. of N. Y.* (22 Hun, 563), reversed. *First Nat. Bk. of Meadville v. Fourth Nat. Bk. of N. Y.* 469



*Un. Trust Co. v. Whiton* (78 N. Y. 491), distinguished. *First Nat. Bk. of Meadville v. Fourth Nat. Bk. of N. Y.* 470

*Taylor v. Wing* (28 Hun, 333), reversed. *Taylor v. Wing.* 471

*Wills v. People* (3 Park. Cr. 473), overruled. *People v. Dowling.* 485

*People v. Runels* (3 Park. Cr. 335), overruled. *People v. Dowling.* 485

*Knupfle v. Knick. Ice Co.* (23 Hun, 159), reversed. *Knupfle v. Knick. Ice Co.* 488

*Jetter v. N. Y. & H. R. R. Co.* (2 Abb. Ct. App. Dec. 458), limited and distinguished. *Knupfle v. Knick. Ice Co.* 491

*Jewett v. Woodward* (1 Edw. Ch. 195), distinguished. *McConnell v. Sherwood.* 530

*Horn v. Henriquez* (18 Wend. 240), distinguished. *McConnell v. Sherwood.* 531

*Cagwin v. Town of Hancock* (22 Hun, 201), reversed. *Cagwin v. Town of Hancock.* 532

*People v. Mitchell* (35 N. Y. 551), distinguished. *Cagwin v. Town of Hancock.* 539

*Bk. of Rome v. Village of Rome* (19 N. Y. 20), distinguished. *Cagwin v. Town of Hancock.* 539

*Hunter v. Wetsell* (57 N. Y. 875), distinguished. *Hunter v. Wetsell.* 553

*Gotendorf v. Goldschmidt* (83 N. Y. 110), distinguished. *Ingersoll v. Mangam.* 627

*Wyeth v. Braniff* (14 Hun, 537), reversed. *Wyeth v. Braniff.* 627

*Condit v. Baldwin* (21 N. Y. 219), distinguished. *Wyeth v. Braniff.* 632

*Kellogg v. Adams* (39 N. Y. 28), distinguished. *Wyeth v. Braniff.* 633

*Steele v. Benham* (Mem. 21 Hun, 411), reversed. *Steele v. Benham.* 634

# CAUSE OF ACTION.

1. An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State through the negligence of the defendant, where it appears that the laws of that State are similar to those of this State, giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same. *Leonard v. Col. S. Nav. Co.* 48

2. A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made. *Root v. Wright.* 72

3. An action upon a guaranty of a mortgage is within the provision of the Revised Statutes (2 R. S. 191, §§ 153, 154), prohibiting any proceedings, unless authorized by the court, after bill filed to foreclose a mortgage for the recovery of the debt secured by the mortgage; and in the absence of such authority the action is not maintainable. *McKernan v. Robinson.* 105

# CHANCERY.

1. The old chancery rule construing testamentary gifts of fixed sums by way of annuities payable out of rents and profits, as authorizing the taking of a sufficient sum from the body of the estate to make up a deficiency, stated to have been modified, so that in such cases the intention of the testator is to be ascertained and effect given to it. *Delaney v. Van Aulen.* 16

# CHARITABLE ASSOCIATIONS.

See BENEVOLENT, ETC., ASSOCIATIONS.

## CHATTEL MORTGAGE.

1. To satisfy the provision of the statute (Chap. 279, Laws of 1833, as amended by chap. 501, Laws of 1873), declaring every chattel mortgage not accompanied by immediate delivery and "followed by an actual and continued change of possession" of the mortgaged property to be void unless the mortgage is filed, and that a mortgage so filed shall cease to be valid as against creditors after one year unless a copy be filed, etc., a constructive or legal change of possession is insufficient; the possession by the mortgagee must be actual, open and public. *Steele v. Benham*. 634

2. S., who was carrying on a manufacturing business on premises owned by him, executed to H. a mortgage on certain of his personal property used in the business. The mortgage was duly filed. S. remained in possession and continued to carry on the business. The mortgage was not refiled as required by the statute. In an action to recover for the alleged taking and conversion of the mortgaged property which had been levied upon by defendant under an execution against S., the testimony on the part of the plaintiff, who is the wife of S., was to the effect that the mortgage soon after its execution was for a valuable consideration assigned to her; that the business and property were *formally* turned over to her, she giving to S. a power of attorney authorizing him to carry it on for her and agreeing to pay him a stipulated sum for his services; that she went to the shop once or twice and gave some directions but took no personal charge of the business, and S. continued to carry on the business, having personal charge of and apparent actual possession of the property as before. *Held*, that there was no such possession in the plaintiff as the statute requires; and that, therefore, the mortgage not having been refiled, ceased to be valid at the end of the year and the property was lawfully levied upon by defendant;

and this although at the time of the levy the pay day named in the mortgage had passed. *Id.*

## CODE OF PROCEDURE.

150.	<i>People v. Dennison.</i>	273
179.	<i>Develin v. Cooper.</i>	410
183, 187.	<i>Toles v. Adee.</i>	222
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275.	<i>Stevens v. Mayor.</i>	296
427.	<i>Palmer v. P. M. L. Ins. Co.</i>	63
	<i>H. N. Bank v. Lacombe.</i>	367
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## CODE OF CIVIL PROCEDURE.

17.	<i>Gormerly v. McGlynn.</i>	284
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416, 424.	<i>Ingersoll v. Mangam.</i>	622
426.	<i>Dunford v. Weaver.</i>	445
	<i>Ingersoll v. Mangam.</i>	622
451.	<i>Bergen v. Wyckoff.</i>	659
531.	<i>Dwight v. G. L. Ins. Co.</i>	493
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791.	<i>Peyser v. Wendi.</i>	642
1023.	<i>Gormerly v. McGlynn.</i>	284
1207.	<i>Stevens v. Mayor.</i>	296
§ 1334.	<i>Bassett v. Wheeler.</i>	406

## COMMON CARRIER.

1. Plaintiff's cattle were transported by defendant from B. to W. A. under a contract which provided, among other things, that in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff should load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle being without food were injured. In an action to recover damages for the injury, *held*, that defendant was not bound to unload the cattle when the train was stopped; but that it was its duty, upon reasonable request, to so place the cars in which the cattle were as to be convenient to the usual and

accessible means of unloading, if practicable, and for a failure so to do it was liable. *Bills v N. Y. C., etc., R. R. Co.* 5

2. Plaintiff's agent made such a request; the engine drawing the train was disabled; it appeared, however, that defendant had engines at U., forty-three miles distant; also that other motive power might have been readily obtained. The court, after referring to the evidence on this subject and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance if help could readily have been obtained. *Held*, no error; and that this was so, even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. *Id.*

3. The engine of the train was disabled by the engineer running it into the water, and there was evidence tending to show negligence on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload was not to be excused by an absence of motive power. *Held*, no error; that defendant could not plead its own previous negligence as an excuse for its inability to perform a distinct and affirmative duty. *Id.*

4. Also *held*, that plaintiff's damages could not be mitigated by speculating upon what might have happened had his request been granted and the cattle unloaded. *Id.*

5. When the train was at U., and those on board were warned of the high water, plaintiff's agent requested the conductor to place the cars there in a convenient position for unloading; this request was declined. The court was asked but declined to charge that defendant was not liable for such refusal; it charged, however, that if the jury believed the conductor had

reason to think he could run the train through without serious detention, defendant would not be liable because of such refusal. *Held*, no error. *Id.*

### CONFLICT OF LAWS.

1. The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid, and he is notified, he becomes absolutely bound to pay the amount at the place named. *Hibernia Nat. Bk. v. Lacombe.* 367
2. The rights of the parties, therefore, are to be governed by the laws of the place of payment. *Id.*
3. An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this State. *Id.*
4. Where a married woman is the owner of stock, of a bank located in a State other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile. *Graham v. First Nat. Bk. Norfolk.* 393

### CONSIDERATION.

— *Sufficiency of, to sustain transfer of estate in expectancy.*  
*See Ham v. Van Orden.* 257

— *Sufficiency of consideration for promissory note.*  
*See First Nat. Bank. v. Tisdale. (Mem.)* 655

### CONSTITUTION.

— *A justice of the Supreme Court who has confirmed report of the referee on reference under the statute of disputed claim, against estate disqualified by State Constitution (art.*

6, § 8) *from sitting at General Term in review of decision.*

*See Duryea v. Traphagen. (Mem.)* 652

### CONSTITUTIONAL LAW.

Defendant was organized as a corporation under the statutes of several States to operate a continuous line of road running through those States which had previously been operated by the consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining States, were repugnant to the provision of the U. S. Constitution (art. 1, § 8, sub. 8), conferring on Congress the power to regulate commerce with foreign nations and among the several States. *Held*, untenable; that in the absence of any legislation by Congress upon the subject, the power so to legislate existed in the States. *Boardman v. L. S. & M. S. R. R. Co.* 157

### CONSTRUCTION.

1. The construction put upon the statutes of another State by its courts is controlling in the tribunals of this State. *Leonard v. Col. S. Nav. Co.* 48
2. Where two different constructions to an instrument are possible, one of which will uphold, the other render it void, the former is to be chosen. *Coyne v. Weaver.* 386

### CONTEMPT.

— *When decision of court below in reference to charge of contempt not reviewable here.*

*See Rider v. Bagley.* 461

### CONTRACTS.

1. A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license; it can only be granted "by deed or conveyance in writing." (2 R. S. 134, § 6.) *Wiseman v. Luckesinger.* 81

2. The parol contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but with its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement. *Id.*

3. A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor. *Id.*

4. The parties owned adjoining city lots, fronting upon a street in which there was no sewer. Defendant built an underground drain or sewer of plank from his house to a sewer in another street; he gave to plaintiff, for the consideration of \$7, a writing stating that the money was received "for the right to drain through my premises," and plaintiff thereupon built a similar drain of plank connecting with defendant's drain. After the lapse of over twenty years, plaintiff took up his drain and replaced it with a drain of tile of greater capacity than defendant's, and also made changes in his privy vault, and thereafter the filth and foul water from his privy flowed back into defendant's cellar; thereupon defendant, on his own land, cut off the connection and refused to allow plaintiff to go upon his premises to open and repair the drain. In an action to restrain defendant from obstructing the sewer and for damages, *held*, that the agreement indicated by the writing could not be inferred to be a permanent one, but it would be satisfied by regarding it as a temporary arrangement, and should be so construed; that the agreement so indicated was good as a license giving plaintiff immunity while acting under it, but giving no vested right to the use or enjoyment of the privilege, against the will of the grantor; and that, therefore, it was revocable at the pleasure of the latter. *Id.*

5. A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made. *Root v. Wright*. 72

6. Where a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic and without knowledge of his incapacity, and that it has been so far performed that said party cannot be placed in *statu quo*, these facts must be alleged and proved. *Riggs v. Am. Tract Soc.* 380

7. H. claimed title to a mortgage executed by B. to F. under a trust deed executed by the latter. F. brought suit against H. to set aside the trust deed, in which action a receiver was appointed of the trust property with authority to collect and satisfy the mortgage. While the order appointing the receiver was in force, one J. F. H., without authority from or request by B., paid to the receiver the amount of said mortgage, receiving the mortgage and a satisfaction-piece thereof, and the receiver paid over the amount to F. H. thereafter commenced an action to foreclose the mortgage, making B., the mortgagor, and T., who held a junior mortgage on the premises, defendants. B. answered, alleging payment and satisfaction of the mortgage. B. and T. thereupon entered into a contract with J. F. H., by which the latter agreed to furnish the papers and evidence to sustain the defense; in consideration thereof, and if the defense should be successful, B. and T. agreed to pay one-half the amount of the mortgage. J. F. H. performed the contract on his part and the action of H. was defeated. In an action upon the contract, *held*,

that plaintiff was entitled to recover, that no corrupt intention appeared upon the face of the contract, and under the circumstances disclosed, there was no ground for supposing that it was entered into for the purpose of perverting justice by procuring false testimony in support of the defense in the foreclosure suit. *Wellington v. Kelly*. 548

— Where action maintainable to compel specific performance of contract of railroad corporation to pay dividends on preferred stock.

*See Boardman v. L. S. & M. S. R. R. Co.* 167

— For work in city of New York, legality of.

*See In re Merriam*. 596

*See COVENANTS.*

## CONTRIBUTION.

1. The death of one of two or more co-sureties does not relieve his estate from a liability to contribute; the law implies a contract between the sureties originating at the time they executed the obligation by which they became such, to contribute ratably toward discharging any liability which they incur in behalf of their principal; and in case of the death of either, the obligation devolves upon his legal representatives the same as any other contract made by him, the breach of which occurs after his death. *Johnson v. Harvey*. 863

## CONTRIBUTORY NEGLIGENCE.

*See NEGLIGENCE.*

## CONVERSION.

1. Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the

same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. At that time they had in their hands of the purchase-price of the exchange more than the value of the corn. In an action for the conversion of the corn, the defense was that defendants bought and paid for the corn in good faith without notice; *held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiffs' demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a portion of the purchase-money before notice of plaintiffs' claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment. *Dows v. Kidder*. 121

2. Also *held*, that the fact that other moneys were mingled with the proceeds of plaintiffs' property did not impair their right. *Id.*
3. Also *held*, that the claim that the money in defendants' hands represented in part the price of bills of exchange drawn against other property as to which defendants were

in the same position was not tenable; that the question between the parties must stand as of the date when plaintiffs made their demand, and a payment then would have been good against every one, no demand by other claimants having then been made. *Id.*

4. Also that such a claim was not within the issues but was inconsistent with the answer. *Id.*
5. *It seems* that if defendants were likely to be vexed by conflicting claims, they had a remedy by action of interpleader, or might have had the other claimants brought in as parties to this action. *Id.*
6. It was objected that if plaintiffs had a cause of action, it was not by action in the nature of trover. *Held*, that as no question of the kind was raised upon the trial, it was not tenable here. *Id.*
7. B., who had leased a hotel in New Jersey of defendant's intestate, and who owned the furniture, leased the hotel and furniture for the unexpired term to E. for a sum specified in addition to the rent as it accrued under the lease to B. E. agreed to keep the furniture insured, and not to sell, remove, or permit the same to be removed; B. agreed that upon payment of the rent and performance of the covenants by E., he would, at the expiration of the term, sell and convey the furniture to E. In case of default on the part of E., B. was authorized to re-enter and take possession of, and to sell the furniture at auction, retaining out of the proceeds the amount of rent unpaid, paying over the surplus to E. B. subsequently transferred his interest in the lease to plaintiff, and assigned to him his interest in the furniture. Defendant's testator caused the furniture to be distrained for non-payment of rent under the statute of New Jersey, which authorizes a landlord to seize for rent in arrears, within six months after the same becomes due, the goods of his tenant on the demised premises, but not those of any other person, although in the

possession of the tenant. In an action for conversion of the furniture, *held*, that the transaction between B. and E. as to said furniture was a conditional sale, the title remaining in B. until performance by E.; that no such interest was transferred to E., as rendered the property subject to be distrained for rent due from him; and that the transfer from B. vested the title in plaintiff, and upon default made by E., he had a right to take possession. *Bean v. Edge.* 510

# CORPORATIONS.

1. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Boardman v. L. S. & M. S. R. R. Co.* 157

2. When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets, including all undeclared dividends. *Id.*

3. While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action and when necessary, to restrain, by injunction, any action adverse to such right. *Id.*

4. The director of a corporation occupies a fiduciary position, and so is within the rule disempowering one intrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust. *Duncomb v. N. Y. H. & N. R. R. Co.* 190

5. The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith. *Id.*

6. But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received. *Id.*

7. Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction, and this is so whether the pledge be taken for a present or a precedent debt. *Id.*

## See BANKS AND BANKING.

BENEVOLENT, ETC., CORPORATIONS.

FERRY COMPANIES.

FOREIGN CORPORATIONS.

INSURANCE (FIRE).

INSURANCE (LIFE).

RAILROAD CORPORATIONS.

STOCK.

## COSTS.

1. Under the provision of the act of 1867 (§ 8, chap. 782, Laws of 1867) in relation to Surrogates' Courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts. *Dunford v. Weaver.* 445

2. Where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. *First National Bk. of M. v. Fourth Nat. Bk.* 469

3. Where, in an equity action, the defendants answered separately and a judgment in their favor was affirmed in this court with costs "to the respondents," *held*, that this authorized but one bill of costs. *Van Gelder v. Van Gelder*. 658
4. The allowance of costs in the Supreme Court in such an action, and whether to one or more respondents, is in the discretion of the court below, and its decision is not reviewable here. *Id.*

— Upon reversal on appeal on the law to General Term from decree of surrogate of county of New York, establishing lost or destroyed will, it is proper to remit proceedings to surrogate, and costs should be awarded against respondent.

*Ses Sheridan v. Houghton. (Mem.)*  
643

#### COUNTER-CLAIM.

1. In an action founded on fraud, a counter-claim founded on contract cannot be allowed. *People v. Denison*. 272
2. Plaintiff's complaint alleged in substance that under color of a contract defendant fraudulently obtained money from the State by means of false representations, false vouchers and collusion with State officers. Defendants set up as a counter-claim a balance due them from the State for work done under the contract. To the answer a reply was served. *Held*, that the cause of action set up as a counter-claim was not one arising out of the transaction upon which plaintiff's claim was founded, within the meaning of the Code of Procedure (§ 150); and that a counter-claim founded on contract was not proper in such an action. *Id.*
3. A State by coming into court as a suitor does not subject itself to an affirmative judgment upon a set-off or counter-claim. *Id.*
4. Authority to render a judgment against the State in one of its own courts cannot be implied but must be express. It cannot be claimed under general laws in which the State is not mentioned. *Id.*
5. Accordingly *held*, that the provision of the Revised Statutes (2 R. S. 552, § 13) providing that civil actions or proceedings instituted in the name of the State "shall be subject to all provisions of law respecting similar suits and proceedings" instituted by individuals, save where otherwise provided, and that the State shall be liable to be nonsuited, etc., did not authorize an affirmative judgment against it on a counter-claim. *Id.*
6. Judgment was rendered upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general, on appeal to this court, gave the required stipulation for judgment absolute. *Held*, that this was not an assent to an affirmative judgment on the counter-claim; that it waived no legal objection to the counter-claim, or immunity of the State from such a judgment. *Id.*
7. It was claimed on the part of defendants that the counter-claim, having been put in issue, would be barred if no judgment was rendered thereon. *Held*, untenable; that defendants' demand for a balance due, not being the proper subject of a counter-claim in this action, was not properly in issue and the judgment rendered would not conclude defendants in respect thereto. *Id.*
8. *It seems*, that the right of a debtor of the United States government, when sued by it, to interpose a counter-claim or counter-credits, rests in all cases upon the provisions of the act of Congress granting and regulating it (Act of March 3, 1797, §§ 3 and 4); and while, under said act, a defendant upon complying with its conditions may give in evidence any counter-claim he may have in his own right, which is a proper subject of set-off, such counter-claim is available only to the extent necessary to defeat the claim of the government, and no affirmative judgment for any excess can be rendered against it. *Id.*



COURT OF APPEALS.

1. An action for an accounting and partition and other relief is not entitled to a preference because the construction of a will is incidentally involved therein. *Peyser v. Wendt.* 643
2. To give a cause a preference under the Code of Civil Procedure (§ 791, subd. 5), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. *Id.*

COVENANTS.

1. A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made. *Root v. Wright.* 73
2. In an action to foreclose two mortgages, it appeared that there was a prior mortgage upon the premises, the beneficiary owner whereof, in pursuance of an agreement under which a fourth mortgage was executed and accepted, covenanted that said mortgage should have priority of lien over his mortgage, as if it had been previously executed and recorded. The lien of the first mortgage was subsequently discharged. *Held*, that the covenant did not give the fourth mortgage a priority of lien over plaintiff's mortgages; that the intent of the parties to the agreement under which the fourth mortgage was taken was not to place that mortgage ahead of plaintiff's mortgages, or to give its owner an interest in the first mortgage, but simply that the lien prior to the fourth mortgage should only be the amount of plaintiff's mortgages; and that the agreement was fully satisfied

by a discharge of the first mortgage. *Taylor v. Wing.* 471

CRIMINAL TRIAL.

1. Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those counts, and a judgment on the verdict is as to them a bar to further prosecution. *People v. Dowling.* 478
2. Upon a reversal of the conviction the trial and conviction are not a bar to a new trial upon the count on which the verdict of guilty was rendered; but the reversal does not disturb the verdict of acquittal upon the other counts. *Id.*
3. An indictment contained two counts, one charging burglary and larceny, the other the receiving of stolen goods with knowledge; there was no separate count for burglary or larceny. The prisoner's counsel, on trial, moved to strike out the count "for burglary" because of failure of proof; this was granted; he then moved to quash the count "for larceny," which was denied, the question of larceny was submitted to the jury without objection and the prisoner was convicted thereof. The conviction was reversed on writ of error and a *venue de novo* ordered. *Held*, that the effect of the decision upon the motion to strike out the count for burglary was simply to hold that the prisoner could not be convicted, on the evidence, of burglary, and to strike out so much of the count as charged that offense; that the new trial must be had upon the same indictment; but that upon the new trial the prisoner could only be tried for larceny. *Id.*
4. The trial was had after the passage of the act of 1876 (chap. 182, Laws of 1876) declaring that persons jointly indicted shall be competent witnesses for each other. One I., who was jointly indicted with the prisoner was called as a

witness on his behalf. His testimony was objected to and refused. *Held*, error. *Id.*

5. Some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the men of whom the alleged purchase was made. This was objected to and excluded. *Held*, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge. *Id.*

6. The prosecution proved the finding at the house of the prisoner of other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. *Held*, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *Id.*

7. The act of 1877 (chap. 167, Laws of 1877) in relation to criminal offenses committed on railroads, providing that for any crime or offense committed within this State \* \* \* "in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offense of receiving with guilty knowledge goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed. *Id.*

## DAMAGES.

— *The damages occasioned by negligence of common carrier cannot be mitigated by speculating upon what might have happened had there been no negligence.*

*See Bills v. N. Y. C. R. R. Co.* 5

— *When interest recoverable as damages in an action against a sheriff for an escape.*

*See Dunford v. Weaver.* 445

— *In an action to recover purchase-price under contract for sale of personal property, measure of damages is contract price less payments; vendor may but is not bound to sell at auction on account of vendee, although property is perishable.*

*See Hunter v. Wetzel.* 549

## DEED.

A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made. *Root v. Wright.* 72

*See GRANTOR AND GRANTEE.*

## DEFINITIONS.

Both at common law and under the statutes of Connecticut, "theft" is recognized as a crime and as synonymous with "larceny." *People ex rel. Jourdan v. Donahue.* 458

## DEMAND.

1. The obligation of a party to refund money, voluntarily paid to him by mistake, can arise only after notification of the mistake, and demand of payment. *Southwick v. First Nat. Bank.* 420

2. Where a demand is necessary it is not excused by showing that defendant would not probably have complied if one had been made; and it matters not that defendant, on the trial, contests plaintiff's right to recover. *Id.*

#### DISTRICT COURTS (NEW YORK CITY).

1. Under the New York city charter of 1878 (§ 71, chap. 835, Laws of 1873), the commissioner of public works being charged with the care of the public buildings has power to appoint janitors of the buildings in which the district civil courts are held; the common council cannot appoint, nor can it delegate to the justices of said court the power to appoint a janitor to take charge of any of the public buildings. *Fagan v. Mayor, etc.* 848

2. Plaintiff was appointed by said commissioner janitor of the building in which the sixth district civil court in said city held its sessions. Defendant C. was appointed janitor by the justice of said court under a resolution of the common council authorizing the justices of said courts to appoint janitors for their courts. The board of estimate and apportionment made an appropriation to pay the salary of one janitor of said court, with the condition, however, that no portion should be paid by the comptroller until the question was judicially determined, in whom, by law, the appointment of janitors was placed; and that "the city is not to be burdened with the expense of two sets of janitors." *Held*, that the appointment of plaintiff was valid; that this was a proper case for impleading C. as an adverse claimant, with the city; that C. had no lawful appointment; that no distinction could be recognized between a janitor of the court and a janitor of the building in which the court is held, and but one janitor could legally serve; and that, therefore, plaintiff alone was entitled to payment out of the appropriation. *Id.*

#### DRAINAGE.

1. A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license; it can only be granted "by deed or conveyance in writing." (2 R. S. 134, § 6.) *Wiseman v. Luckinger.* 31

2. A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor. *Id.*

#### EASEMENTS.

1. A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license; it can only be granted "by deed or conveyance in writing." (2 R. S. 134, § 6.) *Wiseman v. Luckinger.* 31

2. The parties owned adjoining city lots, fronting upon a street in which there was no sewer. Defendant built an underground drain or sewer of plank from his house to a sewer in another street; he gave to plaintiff, for the consideration of \$7, a writing stating that the money was received "for the right to drain through my premises," and plaintiff thereupon built a similar drain of plank connecting with defendant's drain. After the lapse of over twenty years plaintiff took up his drain and replaced it with a drain of tile of greater capacity than defendant's, and also made changes in his privy vault, and thereafter the filth and foul water from his privy flowed back into defendant's cellar; thereupon defendant, on his own land, cut off the connection and refused to allow plaintiff to go upon his premises to open and repair the drain. In an action to restrain defendant from obstructing the sewer and for damages, *held*, that the agreement indicated by the writing could not be inferred to be a permanent one, but it would be satisfied by regarding it as a temporary arrangement,

and should be so construed; that the agreement so indicated was good as a license giving plaintiff immunity while acting under it, but giving no vested right to the use or enjoyment of the privilege, against the will of the grantor; and that, therefore, it was revocable at the pleasure of the latter.

*Id.*

8. Also *held*, that twenty years' user did not give plaintiff a prescriptive right to the easement, as the possession was by consent of defendant and there could be no adverse possession until defendant cut off plaintiff's drain.

*Id.*

### EJECTMENT.

1. An action to recover real property is not within the purview of the act of 1875 (chap. 49, Laws of 1875), authorizing actions to be brought by the people of the State to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the act is to be construed as referring to property of the same general character.

*People v. N. Y. & M. B. R. Co.* 565

2. The act of 1875 (chap. 49, Laws of 1875) authorizing certain actions to be brought by State was not intended to confer jurisdiction to review by means of an action as therein prescribed the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation or violence.

*Id.*

8. Accordingly *held*, that an action by the people was not maintainable under said act to recover lands of a town, the title to which, it was alleged, had been wrongfully acquired, through the wrongful interference of its servants and agents with the action of a town meeting; they procuring the passage of a vote authorizing the con-

veyance of the lands for a grossly inadequate sum, by the action of persons not legal or qualified voters.

*Id.*

### ELECTION OF REMEDIES.

1. The vendor seeking to enforce a contract of sale of personal property may, but is not bound to sell the property at auction after due notice and on account of the vendee he may abandon the property, treat it as the vendee's and sue the latter for the contract-price.

*Hunter v. Wetsell.* 549

2. That the property is perishable does not affect the question.

*Id.*

### EQUITY.

While as a general rule the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion, where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and when necessary, to restrain, by injunction, any action adverse to such right.

*Boardman v. L. S. & M. S. R. R. Co.* 157

— *Allegations of complaint must be established to warrant recovery; so where allegations only warrant legal relief, equitable relief cannot be given.*

*Stevens v. Mayor.* 296

### ESCAPE.

Where an action is brought against a sheriff for an escape, he cannot set up an error in the process under which the arrest was made which renders it simply voidable not void.

*Dunford v. Weaver.* 445

### ESTOPPEL.

1. Where checks forged by plaintiffs' confidential clerk, who filled out

their checks and had charge of their bank account, were paid by defendant, charged to plaintiffs in their pass-book, the book balanced and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the pass-book was written up and vouchers returned, and the clerk by abstracting the forged vouchers and by false balances and readings, prevented the forgeries from being discovered. *Held*, that plaintiffs were not estopped from questioning the accuracy of the account; and that defendant was liable for the balance, deducting the forged checks. *Frank v. Chemical Nat. Bk.* 209

2. Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of the mortgagor that there is no legal or equitable defense to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has been accepted, from disputing such statements. *Smyth v. Munroe.* 357

— When assignment of mortgage is accepted upon faith of statement by mortgagor that there is no legal or equitable defense, he and those deriving title under him estopped from proving agreement between him and mortgagee for release of portion of mortgaged premises.

See *Smyth v. K. L. Ins. Co.* 589

#### EVIDENCE.

1. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge when crossing it in the night. Defendant had placed gates over the foot-

way on each end of the draw which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. *M.*, a boy in defendant's employ, was called as a witness for it, and after testifying on cross-examination that he had been sent at times to pull down the gate, was asked if he told one *B.* on one occasion to pull it down. This was objected to and excluded. *Held*, no error. *Hart v. H. R. Bridge Co.* 56

2. *M.* testified that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say in the presence of people at the draw, when the subject was discussed just after the splash in the water which he heard, that he saw the woman fall from the end of the bridge. One *N.* was called as a witness for plaintiff, who testified that he saw a boy among those gathered on the bridge after the draw was closed, but could not identify *M.* as the one. Plaintiff's counsel then offered to prove that the boy said he saw a woman fall off the bridge; this was excluded; *held*, no error; that the question as to the identity of *M.* with the boy whom *N.* saw was for the court to determine; also that the attention of *M.* was not called with sufficient particularity to the time, place, persons, etc., to lay a foundation for the impeaching evidence. *Id.*

3. A civil engineer having experience in the erection of bridges, as a witness for defendant, was allowed to testify, under objection and exception, that it was not customary to have gates of any kind on draw-bridges. *Held*, no error; that it was competent for the defense to show that the bridge was constructed with extraordinary care. *Id.*

4. The same witness was asked, on cross-examination, whether it was safe and proper to have draws with drop-gates across the foot-path of a bridge when the draw was open; this was objected to

- and excluded. *Held*, no error; that it was a matter of opinion and not within the range of expert evidence. *Id.*
5. Defendant W. was liable as second indorser of a note upon which one F. was primarily liable. F. was also otherwise indebted to W. F. was the owner of certain land upon which C. had a mortgage, and upon which plaintiff had a prior mortgage. C. proposed that W. should take an assignment of his mortgage, and that F. should execute to W. a deed of the land as security for the payment of the sum he should advance to C. and for his liability as indorser; this was assented to by W., and F. and the parties went to the office of an attorney for the purpose of employing him to draw the necessary papers and to consummate the proposed arrangement. A deed of the land was then executed to W., containing a covenant by which he assumed and agreed to pay plaintiff's mortgage. In an action to foreclose said mortgage plaintiff sought to make W. liable for any deficiency, he claiming that the arrangement was changed at the attorney's office, and it was then agreed that F. should convey the land absolutely. To prove this, plaintiff called the attorney, who was permitted to testify, under objection and exception, to the conversation between the parties when the deed was drawn. *Held*, error; that the communications so made were privileged. *Root v. Wright.* 72
6. The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment. *Id.*
7. Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule prohibits him from testifying to such communications in an action between his clients and a third person. *Id.*
8. The trial of an indictment for burglary and larceny, and for receiving stolen goods, was had after the passage of the act of 1876 (Chap. 182, Laws of 1876) declaring that persons jointly indicted shall be competent witnesses for each other. One L., who was jointly indicted with the prisoner, was called as a witness on his behalf. His testimony was objected to and refused. *Held*, error. *People v. Dowling.* 478
9. Some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the men of whom the alleged purchase was made. This was objected to and excluded. *Held*, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge. *Id.*
10. The prosecution proved the finding at the house of the prisoner other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. *Held*, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *Id.*
11. In an action to recover damages

for alleged negligence, proof of the violation of a city ordinance does not establish negligence *per se*; it is competent evidence upon the question to be submitted to the jury, but not conclusive. *Knupfle v. Knick. Ice Co.* 488

12. Under the provisions of the act of 1866 (§ 2, chap. 398, Laws of 1866) authorizing certain towns to subscribe for the stock of the N. Y. & O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, "shall be proved by affidavit, in writing," of one of certain specified town officers, and declaring that such affidavit "or a certified copy thereof shall be evidence of the facts therein contained," the affidavit is not conclusive but only *prima facie* evidence of the facts and may be disputed. *Cagwin v. Town of Hancock.* 532

13. In an action to recover the alleged purchase-price of a quantity of hops, wherein the statute of frauds was set up as a defense, plaintiff's evidence was to the effect, that after an oral contract of sale had been made, defendant made a payment thereon by check and at that time the contract was restated. After defendant had been called as a witness for plaintiff to prove payment of the check, he, as a witness in his own behalf, contradicted plaintiff's evidence as to payment and restatement of contract; he was asked on cross examination, if the price of hops went down after the time of the alleged payment; this was objected to as immaterial and irrelevant and the answer received under objection and exception. *Held*, no error; that the evidence was competent as showing the interest of the witness. *Hunter v. Wetsell.* 549

14. While a party who has called a witness cannot impeach his gen-  
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eral reputation for truth, he may contradict him as to any particular fact testified to, and this, although the evidence may collaterally have the effect of showing that the witness is generally unworthy of belief. *Id.*

15. M., plaintiff's testator, and defendant were formerly partners carrying on a hotel, the leases for which expired at the time fixed for the termination of the partnership. Prior to that time defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the leases declared and adjudged. It appeared that during the pendency of the action M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase-price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had, had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, good-will and leases if put up for sale together would have brought, the partners each having a right to bid at the sale. *Held* no error. *Mitchell v. Read.* 556

16. This action was brought upon a judgment obtained in the State of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. R. G. & Co. That action was brought by the members of the firm, as stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. 90

ment. It appeared that the rule of the common law, that choses in action are not assignable, and that actions thereon when assigned must be brought in the name of the assignor, prevails in said State, and that the laws of said State authorized, in case of assignment, a statement such as was contained in the declaration. *Held*, that the judgment-roll furnished presumptive evidence that plaintiff was the owner of the judgment; that the plaintiff in such an action is merely a nominal party having no interest in or right to control it; nor is he a trustee in any rightful sense under the Code, and so plaintiff alone could sue upon the judgment. *Greene v. Repub. F. Ins. Co.* 572

— *When letters of administration are conclusive as to authority of administrator to bring suit.*  
*See Leonard v. C. S. N. Co.* 48

— *The resolutions of directors of a railroad corporation under which preferred stock is issued, competent evidence in suit to compel it to perform contract to pay dividends.*

*See Boardman v. L. S. & M. S. R. R. Co.* 157

— *Of custom in Insurance Department upon taking assignment of mortgage to require statements from mortgagors of no defense competent.*  
*See Smyth v. Munroe.* 854

— *Declarations of assignor for benefit of creditors made after delivery of possession under it not competent against the assignee.*

*See Coyne v. Weaver.* 886

— *The affidavit of assessors as to the obtaining the requisite consents to the issuing of town bonds only prima facie, not conclusive evidence of facts therein stated.*

*See Town of S. v. Teutonia S. Bank.* 408

— *When entries in book of corporation competent against officers.*

*See First Nat. Bank v. Tisdale. (Mem.)* 655

— *Impeaching, not confined to reputation at time of trial.*

*See Dollner v. Lintz. (Mem.)* 669

— *Of conversation with agent when proper as part of res gestae. Also in action against bank to recover a deposit, evidence that deposit had been attached, properly excluded when not set up in answer.*

*See McGraw v. Tatham. (Mem.)* 677

## EXCEPTION.

1. Upon the trial of an action there was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached. *Held*, that there was no exception bringing the error, if any, to the notice of this court. *Develin v. Cooper.* 410

— *The point that in action on lost note, bond required by statute was not given, cannot be raised for first time on appeal; it must be presented by exception.*

*See Fordham v. Hendrickson. (Mem.)* 654

## EXECUTION.

1. Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (3 R. S. 512, § 28, subd. 4, amended by chap. 101, Laws of 1879), which authorizes the removal, as a tenant, of any person, holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment debtor, and all who hold under him under pretense of title acquired from him, posterior to the judgment. *People ex rel. Higgins v. McAdam.* 287

2. Accordingly *held*, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who



held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors, recovered prior to the appointment of the receiver, the Supreme Court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the Supreme Court the receiver was in effect the person against whom the execution was issued. *Id.*

— *When property covered by chattel mortgage may lawfully be levied upon under execution.*  
*See Steele v. Benham.* 634

#### EXECUTORS AND ADMINISTRATORS.

1. An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State through the negligence of the defendant, where it appears that the laws of that State are similar to those of this State giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same. *Leonard v. Col. S. Nav. Co.* 48
2. An administrator appointed in this State may maintain the action without showing that letters of administration have been taken out in the State where the death occurred. *Id.*
3. Letters of administration granted by a surrogate in this State, where the intestate died leaving assets in his county, are conclusive as to the authority to bring such action. *Id.*
4. Under the provision of the Code of Procedure (§ 427) authorizing the bringing of an action against a foreign corporation by "a resident of this State for any cause of ac-

tion," *held*, that an action was properly brought in this State by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that State, the will having been admitted to probate in that State, and afterward, upon production to the surrogate of an authenticated copy having been admitted to probate in this State. *Palmer v. Phenix M. L. Ins. Co.* 63

5. An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs. *McCabe v. Fowler.* 314
6. N., in his life-time, left certain United States bonds in the hands of O. for safe-keeping, who was at the time responsible, of good character and considered entirely trustworthy. N. died in 1865, leaving a will by which his widow was appointed executrix, and W., defendant's testator, executor. The latter qualified, the former did not until after the death of W. The bonds were converted into other bonds which remained in the custody of O. until W. died in 1871. W. also left securities of his own in the hands of O. After the death of W. the widow of N. qualified as executrix, but no letters testamentary were issued to her. Her attorney took charge of the estate; no call was made upon O. to deliver up the bonds; after his death, which occurred in 1875, it appeared that in 1874 he hypothesized the bonds as collateral for a loan made to a firm of which he was a member; said firm, including O., were insolvent. In an action to charge the estate of W. with the amount of the bonds so lost to the estate of N., *held*, that there was no negligence or want of care and vigilance on the part of W. such as would authorize a recovery. *Id.*

7. Where the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guaranteed by the widow who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, *held*, that it was the right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing. *Omiston v. Olcott*. 339
8. The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees. *Id.*
9. Also *held*, that while it was the duty of the surviving executor to foreclose the mortgage in case of non-payment, he was entitled to exercise the reasonable discretion of an ordinarily prudent man as to the time and occasion. *Id.*
10. Under the provision of the act of 1867 (§ 8, chap. 782, Laws of 1867) in relation to Surrogates' Courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts. *Dunford v. Weaver*. 445
11. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (3 R. S. 221, § 6, sub. 4.) *Id.*
12. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*. *Id.*
13. Where a sheriff is sued for an escape from custody under such an attachment, the plaintiff is entitled to recover the damages sustained by him (Code of Civil Procedure, § 158), to wit: the sums awarded to him by the surrogate's decree, with interest from its date. *Id.*
14. The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which on payment were assigned to plaintiff. *Held*, that this was not a payment and extinguishment of the claims. *Id.*

## EXTRADITION.

1. The provision of the Federal Constitution (art. 4, § 2), requiring the surrender, on demand of the executive authority of a State, of fugitives from justice "charged with treason, felony or other crimes" who are found in another State, and the provision of the U. S. Statutes giving practical effect thereto (U. S. R. S., § 5278), embrace every criminal offense and every act forbidden and made punishable by the law of the State where the act was committed. *People ex rel. Jourdan v. Donohue*. 438
2. Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires. *Id.*

3. Both at common law and under the statutes of Connecticut, "theft" is recognized as a crime and as synonymous with "larceny." *Id.*
4. Where, therefore, to a writ of *habeas corpus*, a warrant of extradition issued by the governor of this State was alone returned, which recited a representation by the governor of Connecticut, that the prisoner stood "charged with the crime of theft" committed in said State, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner "is charged with said crime and with having fled from the said State," and that such papers were certified by said governor to be duly authenticated, *held*, that the warrant fully complied with the statute and sufficiently established the conditions necessary to its issue; that it was not necessary to state therein the facts constituting the alleged crime. *Id.*

#### FERRY COMPANIES.

1. While a ferry company is bound to use the strictest diligence in providing suitable and safe accommodation for landing passengers from its boats, it is not bound to so provide against any possibility of danger that they can meet with no casualty. *Loftus v. Un. Ferry Co., Brooklyn.* 455
2. Defendant landed passengers from its ferry boats by means of a float or bridge, between each side of which and the adjoining pier was a space of from eight to twelve inches, left for the movement of the bridge under the action of the tide and the impact of the boats on entering the slip. On each side was a guard, with a sill along the outer line of the passage-way rising six or eight inches from the floor of the bridge which was spanned by an arched rail, at the center about three feet above the sill, supported by stanchions in the sill about six feet apart. Between the sill and this rail was another rail twenty or twenty-two inches above and paral-

lel with the sill. Plaintiff's intestate, a child six years old, while leaving one of defendant's boats, in passing over this bridge, fell through one of the openings in the guard into the water and was drowned. In an action to recover damages it appeared that the bridge had been constructed five or six years before the accident and was similar to bridges at other ferries of the defendant over which millions of people passed annually and no similar accident had previously happened. *Held*, that defendant was not chargeable with any actionable negligence; and that a verdict for plaintiff was properly set aside. *Id.*

#### FINDINGS OF LAW AND FACT.

The provision of the Code of Civil Procedure (§ 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of rule 82 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. *Gormerly v. Mc Glynn.* 284

#### FORECLOSURE.

1. An action upon a guaranty of a mortgage is within the provision of the Revised Statutes (2 R. S. 191, §§ 153, 154), prohibiting any proceedings, unless authorized by the court, after bill filed to foreclose a mortgage for the recovery of the debt secured by the mortgage; and in the absence of such authority the action is not maintainable. *McKernan v. Robinson.* 105
2. Where, however, such an action has been commenced without previous authority, the court may by subsequent order made *nunc pro tunc* grant permission, and so re-

- move the impediment to the maintenance of the action founded upon the statute. *Id.*
3. Defendant A. executed to an insurance company his bond for \$40,000, secured by mortgage executed by him and by defendant J., his wife, upon lands owned by the latter. At the same time the mortgagors signed a written instrument in which they consented to the assignment of the mortgage to the superintendent of the insurance department, and stated that no portion of the mortgage debt had been paid and that there was "no offset to or legal or equitable defense to the same." The insurance company became insolvent and a receiver of its effects was appointed. In an action by the superintendent to foreclose the mortgage, wherein the defense of usury was interposed, it appeared that it was the custom of the insurance department to require such statements as a condition precedent to the acceptance of assignments of mortgages, and that the instrument was taken and deposited with the other papers in the office of the superintendent. *Helt*, that it was to be presumed that the superintendent acted in accepting the assignment, and as an essential part of the transaction, upon the faith of the representations in said instrument; that, therefore, a finding to that effect was justified; and that defendants were estopped from availing themselves of said defense. *Smyth v. Munroe*. 354
4. By the appointment of a receiver in a foreclosure suit the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them. *Rider v. Bagley*. 461
5. *It seems* that, assuming the court has power to compel such owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. *Id.*
6. So, also, where fraud or contempt upon the Supreme Court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. *Id.*
7. The provision of the act of 1853 in reference to the foreclosure of railroad mortgages (§ 2, chap. 502, Laws of 1853), which provides that a stockholder of a railroad company may, within six months after a sale of its road under foreclosure, on paying to the purchaser a proportion of the price paid equal to the proportion his stock bears to the whole stock of the company, have the same relative amount of stock or interest in the company, its road, franchises, and other property, etc., was repealed by the act of 1854, amending the general railroad act (Chap. 382, Laws of 1854), and by the act of 1874 (Chap. 430, Laws of 1874), "to facilitate the reorganization of railroads sold under mortgages," etc. *Pratt v. Munson*. 582.
8. H. executed a bond and mortgage to a life insurance company by whom it was assigned to the superintendent of the insurance department. The assignment was accompanied by, and was accepted by the superintendent upon the faith of a writing signed by H., consenting to the assignment, and certifying that the amount secured by the mortgage was unpaid, and that there was "no offset to or legal or equitable defense against the same." The assignment was duly recorded. Subsequently H. sold and conveyed the premises covered by the mortgage to N., who conveyed a portion thereof to McC. About the time of the conveyance to McC. the insurance company executed and delivered to N., he having no knowledge of the assignment, a release of that portion of the mortgaged premises conveyed to McC. Defendant, the K. L. I. Co., in reliance upon the release, made a loan to McC., so-

cured by mortgage on the premises so conveyed to her. In an action to foreclose the mortgage executed to the superintendent, the K. L. I. Co. set up and offered to prove an oral agreement between H. and his mortgagee at the time his mortgage was executed, that upon the completion of a dwelling-house then being erected on the mortgaged premises, that portion conveyed to McC. should be released, and that the release was executed in pursuance thereof. This was objected to and excluded. *Held*, no error; that the release was void, as the record of the assignment was constructive notice to subsequent purchasers of the mortgaged premises; and that H. and those deriving title under him were estopped from proving the agreement. *Smyth v. Knick. L. Ins. Co.* 589

9. In an action to foreclose a mortgage, one of the defendants, who owned an interest in the mortgaged premises, was an infant under the age of fourteen; he resided with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother, in this State, who, after such service, upon her own application, was by order appointed a guardian *ad litem*, with authority to appear and defend in behalf of the infant, and she appeared and put in a general answer. Upon application to compel a purchaser at the sale under the judgment to complete his purchase, *held*, that the court had no jurisdiction over the infant defendant to appoint a guardian *ad litem*, as said defendant had not been brought in, and the action had not been commenced as against him (Code, § 416); that an appearance by the guardian was not an appearance by the infant; that the judgment, therefore, was not binding upon him, the sale under it did not convey a good title, and the motion was properly denied. *Ingersoll v. Mangum.* 622

— *Rights of parties holding bonds*

*of railroad corporation on foreclosure of mortgage securing the bonds.*

*See Duncomb v. N. Y., H. & N. R. R. Co.* 190

*See MORTGAGE.*

## FOREIGN CORPORATIONS.

1. Under the provision of the Code of Procedure (§ 427) authorizing the bringing of an action against a foreign corporation by "a resident of this State for any cause of action," *held*, that an action was properly brought in this State by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that State, the will having been admitted to probate in that State, and afterward, upon production to the surrogate of an authenticated copy, having been admitted to probate in this State. *Palmer v. Phoenix M. L. Ins. Co.* 63

2. A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein. *Boardman v. L. S. & M. S. R. R. Co.* 157

3. The plaintiff, a national bank organized and having a place of business in New Orleans, purchased for value of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court, and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held* that, under and within the meaning of the provision of the Code of Procedure (§ 427) providing that an action against a foreign

corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident; that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action. *Hibernia Nat. Bk. v. Lacombe*. 367

### FOREIGN LAWS.

1. The construction put upon the statutes of another State by its courts is controlling in the tribunals of this State. *Leonard v. Col. S. Nav. Co.* 48
2. An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State through the negligence of the defendant, where it appears that the laws of that State are similar to those of this State giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same. *Id.*
3. *It seems*, however, that the existence of such statutes in the other State must be proved; it cannot be presumed. *Id.*

### FORGERY.

Where forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud; at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger. *Frank v. Chemical Nat. Bk.* 209

### FORMER ADJUDICATION.

1. Where, on the trial of an indictment containing different counts there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those counts, and a judgment on the verdict is as to them a bar to further prosecution. *People v. Dowling*. 478
2. Upon a reversal of the conviction the trial and conviction are not a bar to a new trial upon the count on which the verdict of guilty was rendered; but the reversal does not disturb the verdict of acquittal upon the other counts. *Id.*

— Where in an action for fraud a counter-claim founded on contract is set up and put at issue but is disallowed, the judgment not a bar to an action on the counter-claim.

*See People v. Dennison.* 272

### FRAUD.

1. Where the *gravamen* of an action is fraud, plaintiffs having failed to establish the fraud cannot maintain the action on the theory that a liability founded on contract was disclosed by the evidence. *People v. Dennison.* 272
2. In an action founded on fraud, a counter-claim founded on contract cannot be allowed. *Id.*
3. The provision of the statute (2 R. S. 23, § 35, sub. 7) declaring a discharge of an insolvent from his debts void "if he shall be guilty of any fraud whatever contrary to the true intent" of the article, refers to a fraud perpetrated in the proceedings to obtain the discharge, not to a fraud in the creating of the debt. *Develin v. Cooper.* 410

— When allegations of fraud in complaint in action for an accounting do not change character of action. *See Harrington v. Bruce.* 103

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GENERAL TERM.

Where a plaintiff in an action for partition dies after argument at General Term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the General Term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. *Bergen v. Wyckoff*. 659

GIFT.

— Where assignment without consideration of estate in expectancy valid as a gift.

See *Ham v. Van Orden*. 257

GRANTOR AND GRANTEE.

1. *It seems* that the mere fact that the purchaser of lands took subject to a mortgage does not render him liable, either legally or equitably, to indemnify his grantor against the mortgage. *Smith v. Trustlow*. 680

2. *It seems*, however, the rule would be otherwise if the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchaser, or if he retained its amount. *Id.*

GUARDIAN AD LITEM.

A guardian *ad litem* can only be regularly appointed for such a defendant after service of summons personally or by the substituted mode of service prescribed. *Ingersoll v. Mangam*. 623

HABEAS CORPUS.

Where, therefore, to a writ of *habeas corpus*, a warrant of extradition issued by the governor of

this State was alone returned, which recited a representation by the governor of Connecticut, that the prisoner stood "charged with the crime of theft" committed in said State, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner "is charged with said crime and with having fled from the said State," and that such papers were certified by said governor to be duly authenticated, *held*, that the warrant fully complied with the statute and sufficiently established the conditions necessary to its issue; that it was not necessary to state therein the facts constituting the alleged crime. *People ex rel. Jourdan v. Donohue*. 488

HIGHWAYS.

1. A railroad corporation is not relieved from the duty imposed upon it by the general railroad act (sub. 5, § 28, chap. 140, Laws of 1850) to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness" by the fact that a street railway company whose road runs along the highway is obligated to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to or duties imposed upon others. *Masterson v. N. Y. C., etc., R. R. Co.* 247

2. The provision of the general railroad act (§ 28, chap. 140, Laws of 1850), giving to every railroad company authority to construct its road across any street or highway which the route of its road shall intersect, was not repealed by implication by the acts of 1869 and 1874, providing for the laying out of the highways or avenues, known as "Ocean Parkway" (Chap. 861, Laws of 1869; chap. 583, Laws of 1874), so far as it pertains to those highways; they are highways within the meaning of the railroad act, and railroads have the same au-

thority to cross them as they have to cross other highways. *Stranahan v. Sea View R. R. Co.* 809

3. The act of 1871 (Chap. 609, Laws of 1871) declaring that "no railway upon which locomotive steam shall be used, or is or shall be authorized or intended to be used as a motive power," shall be constructed across certain avenues therein mentioned, without the approval of the State engineer, has no application to that portion of "Ocean Parkway" constructed under said act of 1874. *Id.*

4. The said act of 1871 has reference to railroads moving cars in the ordinary way by means of locomotive engines, it does not include railways moving their cars by a propelling rope or cable attached to stationary power. *Id.*

5. Accordingly *held*, that a railroad corporation organized under the act of 1866 (Chap. 697, Laws of 1866), for the purpose of constructing an elevated railroad to be operated "by means of a propelling rope or cable attached to stationary power," had authority under the said provision of the general railroad act, which by said act of 1866 is made applicable to corporations organized under it, to cross that portion of "Ocean Parkway" constructed under the act of 1874, which was intersected by the route of its road. *Id.*

#### HUSBAND AND WIFE.

— *Deposit by husband in name of wife belongs to her.*

*See McGraw v. Tatham. (Mem.) 677*

*See* MARRIED WOMEN.

#### IMPRISONMENT.

*See* INSOLVENCY.

#### INDICTMENT.

The act of 1877 (Chap. 167, Laws of 1877) in relation to criminal of-

fenses committed on railroads, providing that for any crime or offense committed within this State \* \* \*

"in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offense of receiving, with guilty knowledge, goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed. *People v. Dowling.* 478

#### INFANTS.

1. Under the Code of Civil Procedure (§ 426), to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons within the State, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient. *Ingersoll v. Mangam.* 622
2. A guardian *ad litem* can only be regularly appointed for such a defendant after service of summons personally or by the substituted mode of service prescribed. *Id.*
3. An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the Code (§ 424) which provides that such an appearance shall be equivalent to personal service of the summons. *Id.*

#### INJUNCTION.

Two corporations organized under the laws of Great Britain entered into an agreement, which provided, in case of difference, for arbitrators to be appointed and to act in this State, having the powers given to arbitrators under the English common-law procedure, their



award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other and arbitrators appointed under the agreement, to restrain the prosecution of the arbitration, the Special Term denied plaintiff's motion for a preliminary injunction on the ground as stated in the order "that the court has no jurisdiction in this action." *Held*, error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the State. *Direct U. S. Cable Co. v. Dom. Tel. Co.* 153

### INSANE PERSONS.

1. This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them in fraud of the rights of the lunatic. *Held*, that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character; and that an order of reference was not reviewable here. *Harrington v. Bruce.* 103

2. Plaintiff's complaint alleged in substance that R., his intestate, being at the time of unsound mind, transferred to defendant various sums of money under an agreement, in writing, by which defendant agreed to pay to R. the interest on said money during his life, and after his death interest on the whole or a part thereof to his executor or administrator for the benefit of his widow, or directly to his widow and his sister for their benefit during their lives; that interest was paid by defendant up to the death of R., but not since; that the sister of R. died shortly

after his death; that plaintiff, after his appointment as administrator, obtained from the widow her written consent that he might surrender the written agreement, which he offered to do, and demanded a return of the moneys which defendant refused. On demurrer to the complaint, *held*, that it stated a good cause of action; that the allegation as to unsoundness of mind was one of fact, and the contract was one that could be rescinded. *Riggs v. Am. Tract Soc.* 330

3. Where a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic and without knowledge of his incapacity, and that it has been so far performed that said party cannot be placed in *statu quo*, these facts must be alleged and proved. *Id.*

### INSOLVENCY.

1. Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 R. S. 28, § 1 *et seq.*), contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings. *Develin v. Cooper.* 410
2. If the order omits a recital of any necessary fact the sheriff will be protected if he can show *aliunde* the existence of the fact. *Id.*
3. The said article includes a debtor who has been charged in execution. *Id.*
4. The proof required to be made at the time of presenting the petition, and before granting the discharge (2 R. S. 35, § 2), that the debtor resides, or is imprisoned, in the county in which the officer to

whom the application is made resides, may be made by the verified petition alone. *Id.*

5. In an action against a sheriff for an escape, wherein he justified under a discharge granted by the county judge of the county of Suffolk, which contained a recital that "Frederick Maxwell, the debtor, of the town of Southold, in the county of Suffolk, did present a petition." *Held*, that the recital was sufficient proof of the place of residence, and that proof thereof was made to the officer granting it. *Id.*

6. The petition, which was verified to be "true in all respects," began thus: "The petition of Frederick Maxwell, of Southold, in the county of Suffolk, \* \* \* respectfully sheweth," etc. The petition recited that Maxwell was in custody of the sheriff of Suffolk county on execution and had given bail for the jail liberties. *Held*, that the first statement was not sufficient to make proof of residence in the county; but that being out of jail on the liberties was, in the judgment of the law, being in prison; and the last recital, therefore, was in effect an averment of imprisonment in the county, and so gave jurisdiction of the person of the debtor. *Id.*

7. The said article of the Revised Statutes was not repealed by the act abolishing imprisonment for debt (Chap. 800, Laws of 1831). *Id.*

8. Nor was it repealed by the provision of the Code of Procedure (§ 179, sub. 4), authorizing the arrest of a defendant in an action on contract who has been guilty of fraud in contracting the debt or incurring the obligation. *Id.*

9. The provision of the statute (2 R. S. 24, § 35, sub. 7) declaring a discharge of an insolvent from his debts void "if he shall be guilty of any fraud whatever contrary to the true intent" of the article, refers to a fraud perpetrated in the proceedings to obtain the discharge,

not to a fraud in the creating of the debt. *Id.*

10. It was proved that the discharge was handed to the defendant and he was asked if he would let Maxwell go; that he took time to advise with his counsel, and that the next day Maxwell was at his home beyond the jail liberties. *Held*, the presumption was that he was set free in consequence of the discharge. *Id.*

#### INSURANCE DEPARTMENT.

1. Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of a mortgagor that there is no legal or equitable defense to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has been accepted, from disputing such statements. *Smyth v. Munroe*. 854

2. Defendant A. executed to an insurance company his bond for \$40,000, secured by mortgage executed by him and by defendant J., his wife, upon lands owned by the latter. At the same time the mortgagors signed a written instrument in which they consented to the assignment of the mortgage to the superintendent of the insurance department, and stated that no portion of the mortgage debt had been paid and that there was "no offset to or legal or equitable defense to the same." The insurance company became insolvent and a receiver of its effects was appointed. In an action by the superintendent to foreclose the mortgage, wherein the defense of usury was interposed, it appeared that it was the custom of the insurance department to require such statements as a condition precedent to the acceptance of assignments of mortgages, and that the instrument was taken and deposited

with the other papers in the office of the superintendent. *Held*, that it was to be presumed that the superintendent acted in accepting the assignment, and as an essential part of the transaction, upon the faith of the representations in said instrument; that, therefore, a finding to that effect was justified; and that defendants were estopped from availing themselves of said defense. *Id.*

3. Also *held*, that in the absence of proof of fraud, or want of knowledge, it was a legal presumption that the parties executing said instrument did so with knowledge of its contents; and that this presumption was not affected by the fact that one of them was a married woman; also, that as against a person who had acted upon the faith of her representation she could not be exonerated therefrom by reason of her ignorance. *Id.*

4. Also *held*, that knowledge on the part of the insurance company of the usury could not be attributed to and did not affect the superintendent. *Id.*

5. Also *held*, that evidence was competent showing the custom of the department in such transactions. *Id.*

6. H. executed a bond and mortgage to a life insurance company by whom it was assigned to the superintendent of the insurance department. The assignment was accompanied by, and was accepted by the superintendent upon the faith of a writing signed by H., consenting to the assignment, and certifying that the amount secured by the mortgage was unpaid, and that there was "no offset to or legal or equitable defense against the same." The assignment was duly recorded. Subsequently H. sold and conveyed the premises covered by the mortgage to N., who conveyed a portion thereof to McC. About the time of the conveyance to McC. the insurance company executed and delivered to N., he having no knowledge of the assignment, a release of that portion

of the mortgaged premises conveyed to McC. Defendant, the K. L. I. Co., in reliance upon the release, made a loan to McC., secured by mortgage on the premises so conveyed to her. In an action to foreclose the mortgage executed to the superintendent, the K. L. I. Co. set up and offered to prove an oral agreement between H. and his mortgagee at the time his mortgage was executed, that upon the completion of a dwelling-house then being erected on the mortgaged premises, that portion conveyed to McC. should be released, and that the release was executed in pursuance thereof. This was objected to and excluded. *Held*, no error; that the release was void, as the record of the assignment was constructive notice to subsequent purchasers of the mortgaged premises; and that H. and those deriving title under him were estopped from proving the agreement. *Smyth v. Knick. L. Ins. Co.* 589

#### INSURANCE (FIRE).

— *What amounts to assignment of policy of.*  
*See Greene v. R. F. Ins. Co.* 573

#### INSURANCE (LIFE).

1. Under the provision of the Code of Procedure (§ 427) authorizing the bringing of an action against a foreign corporation by "a resident of this State for any cause of action," *held*, that an action was properly brought in this State by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that State, the will having been admitted to probate in that State, and afterward, upon production to the surrogate of an authenticated copy having been admitted to probate in this State. *Palmer v. Phoenix M. L. Ins. Co.* 63
2. The policy acknowledged receipt of the first premium, and con-

tained a condition avoiding it in case of non-payment of the annual premium on or before the date it fell due. There was also a notice indorsed upon the policy to the effect that no receipts for premiums should be valid unless signed by the president or secretary, and that no agent had authority to alter a policy or to receive any premium after it became due "without special permission from the officers of the company." S., who was general agent of defendant for the State of Rhode Island, took the application for the policy in question in Connecticut. He took notes for the first premium, which contained a condition avoiding the policy if the amount was not paid when due; he forwarded the application to defendant, received the policy and delivered it to the insured. The first note was not paid when due and the insured wrote to S., expressing inability to pay and asking to be relieved from liability. S. thereafter made a new agreement, taking new notes with longer time to run, the notes containing the same condition, printed forms furnished the agent by the company being used. S. informed the defendant of this arrangement and forwarded to it two of the notes; it made no objection, received the money on the first note falling due, which was paid at maturity, and retained the others until after the death of the insured. The second note not being paid at maturity, S. wrote to the insured, using paper with a printed heading furnished by the company, in which he was styled its general agent, asking for payment of the note by a day named, and this not having been complied with, again wrote, asking the insured to send the amount "by return of mail or by express." On the day this letter reached the insured he inclosed the amount in bank bills in a letter addressed to S. at his place of residence, which he mailed in time for a mail leaving the same day, although not the first mail after the receipt of the letter. The letter, with its contents, never was received by S. In an action upon the

policy, *held*, that the condition and notice had no reference to the first premium, but only to subsequent ones, and so placed no restrictions upon the power of S. as to the notes taken by him, and in the absence of any notice of a limitation upon his authority as general agent the insured had a right to suppose he could extend the time and prescribe the mode of payment, and that payment in the mode prescribed was binding upon the defendant; that the direction in the letter of S., to send by return mail, did not require the answer to be sent by the first return mail; that the insured was entitled to a reasonable time for compliance before he could be put in default; and that the letter with money was mailed in time. *Id.*

#### INTEREST.

It was stipulated in plaintiff's mortgages which were executed prior to the passage of the act (Chap. 538, Laws of 1879) reducing the rate of interest to six per cent, that the principal sum should bear interest at seven per cent until paid. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due, from the date of the decision, at the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate. *Taylor v. Wing.* 471

— *When recoverable in action to compel performance by railroad corporation of contract to pay dividends on preferred stock.*

*See Boardman v. L. S. & M. S. R. R. Co.* 157

— *When interest recoverable as damages in an action against a sheriff for an escape.*

*See Dunford v. Weaver.* 445

INTERPLEADER.

— *When a defendant likely to be vexed by conflicting claims may have remedy by action of interpleader or by having other claimants brought in.*  
*See Dows v. Kidder.* 121

JUDGE.

— *A justice of the Supreme Court who has confirmed report of referee in reference under the statute of disputed claim against estate, disqualified by State Constitution (art. 6, § 8) from sitting at General Term in review of decision.*  
*See Duryea v. Traphagen. (Mem.)* 652

JUDGMENT.

1. *It seems that the only way to subject a judgment to an attachment is to serve the warrant upon the judgment debtor.* *In re Flundrow.* 1

2. *Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal.* *Leonard v. Col. S. Nav. Co.* 48

3. *This action was brought upon a judgment obtained in the State of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. R. G. & Co. That action was brought by the members of the firm, as stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. It appeared that the rule of the common law, that choses in action are not assignable, and that actions thereon when assigned must be brought in the name of the assignor, prevails in said State, and that the laws of said State authorized, in case of assignment, a statement such as was contained in the declaration. Held, that the judgment-roll furnished presumptive evidence that plaintiff was the owner of the judgment; that the plaintiff in such an action is merely a nominal party having no interest in or right to control it; nor is he*

*a trustee in any rightful sense under the Code, and so plaintiff alone could sue upon the judgment.* *Greens v. Republic F. Ins. Co.* 572

4. *The Supreme Court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here.* *Wilson v. Simpson.* 674

— *When provision in judgment providing for the happening of a future contingency is unauthorized.*  
*See Livingston v. Gordon.* 136

— *In action of foreclosure, mortgage is merged in judgment, and after entry interest should be at rate then lawful.*  
*See Taylor v. Wing.* 471

— *When foreclosure judgment has been assigned as security for a usurious loan, and mortgaged property sold under judgment, assignment void, and judgment, setting it and all subsequent proceedings under judgment aside, proper.*  
*See Wyeth v. Braniff.* 627.

JUDICIAL SALES.

1. *Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 R. S. 512, § 28, subd. 4, amended by Chap. 101, Laws of 1879), which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment debtor, and all who hold under him under pretense of title acquired from him, posterior to the judgment.* *People ex rel. Higgins v. McAdam.* 287

2. In an action to foreclose a mortgage, one of the defendants, who owned an interest in the mortgaged premises, was an infant under the age of fourteen; he resided with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother, in this State, who, after such service, upon her own application, was by order appointed a guardian *ad litem*, with authority to appear and defend in behalf of the infant, and she appeared and put in a general answer. Upon application to compel a purchaser at the sale under the judgment to complete his purchase, *held*, that the court had no jurisdiction over the infant defendant to appoint a guardian *ad litem*, as said defendant had not been brought in, and the action had not been commenced as against him (Code, § 416); that an appearance by the guardian was not an appearance by the infant; that the judgment, therefore, was not binding upon him, the sale under it did not convey a good title, and the motion was properly denied. *Ingersoll v. Mangam.* 623

— When foreclosure judgment has been assigned as security for a usurious loan and mortgaged property sold under judgment, assignment void, and judgment, setting it and sale under foreclosure judgment aside, proper. See *Wyeth v. Braniff.* 627

#### JURISDICTION.

1. Two corporations, organized under the laws of Great Britain, entered into an agreement, which provided, in case of difference, for arbitrators to be appointed, and to act in this State, having the powers given to arbitrators under the English common-law procedure, their award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other, and arbitrators appointed under the agreement to restrain the prosecution of the arbitration, the Spe-

cial Term denied plaintiff's motion for a preliminary injunction on the ground as stated in the order "that the court has no jurisdiction in this action." *Held*, error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the State. *Direct U. S. Cable Co. v. Dom. Tel. Co.* 153

2. The plaintiff, a national bank organized and having a place of business in New Orleans, purchased for value of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for \$10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and payment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court, and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that, under and within the meaning of the provision of the Code of Procedure (§ 427) providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this State, "where the cause of action shall have arisen in this State," plaintiff was to be regarded as a non-resident; that the cause of action arose in this State; and that, therefore, the court had jurisdiction of the action. *Hibernia Nat. Bk. v. La-combe.* 367

3. The jurisdiction of quasi judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction. *Cagwin v. Town of Hancock.* 532

4. Under the provisions of the Code of Procedure (§ 227), as amended by section 6, chapter 723, Laws of 1866, declaring that, for the purposes of an attachment, an action shall be deemed commenced when the summons is issued, provided that personal service thereof shall

be made or publication commenced within thirty days, the vitality of an attachment depended upon compliance with the terms of the proviso; and, upon omission so to do, the jurisdiction which attached on granting the warrant ceased. *Blossom v. Estes.* 614

5. In an action to foreclose a mortgage, one of the defendants, who owned an interest in the mortgaged premises, was an infant under the age of fourteen; he resided with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother, in this State, who, after such service, upon her own application, was by order appointed a guardian *ad litem*, with authority to appear and defend in behalf of the infant, and she appeared and put in a general answer. Upon application to compel a purchaser at the sale under the judgment to complete his purchase, *held*, that the court had no jurisdiction over the infant defendant to appoint a guardian *ad litem*, as said defendant had not been brought in, and the action had not been commenced as against him (Code, § 416); that an appearance by the guardian was not an appearance by the infant; that the judgment, therefore, was not binding upon him, the sale under it did not convey a good title, and the motion was properly denied. *Ingersoll v. Mangam.* 623

— *Of court to order bill of particulars, and to affix a disability to disobedience.*

*See Dwight v. G. L. Ins. Co.* 493

— *Where general, on death of party after argument of appeal from order, may direct its order to be entered nunc pro tunc.*

*See Bergen v. Wyckoff.* 659

— *Sufficiency of papers to give jurisdiction to grant order of arrest.*

*See King v. Arnold. (Mem.)* 668

## LACHES.

— *When good defense to action against bail.*

*See Toles v. Adee.* 222

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## LANDLORD AND TENANT.

*See SUMMARY PROCEEDINGS.*

## LARCENY.

— *Theft and larceny synonymous terms.*

*See People ex rel. v. Donohue.* 438

## LAW.

Plaintiff's complaint alleged in substance that prior to July, 1866, he was the owner of certain premises in the city of New York, part of an old street which had been closed and a new street opened, of which fact and of his title plaintiff was ignorant; that defendant sold said premises at public auction, and thereafter applied to the plaintiff for a release and conveyance of his title, at the time, "fraudulently and with intent to deceive," keeping concealed from him the facts, and falsely informing him that he had some slight claim, a mere equitable one of no value, and "that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, executed and delivered such release without any consideration." That the premises so conveyed were worth \$200,000, and judgment was demanded for that amount. The answer denied the allegations of fraud, and the referee found in favor of defendant. *Held*, that the action was one at law only, and plaintiff not having sustained the allegations of the complaint, a judgment for defendant was proper, although the case may have presented matters of equitable cognizance. *Stevens v. Mayor, etc.* 296

## LEASE.

1. B. who had leased a hotel in New Jersey of defendant's intestate, and who owned the furniture, leased the hotel and furniture for the unexpired term to E. for a sum specified in addition to the rent as it accrued under the lease 92

to B. E. agreed to keep the furniture insured, and not to sell, remove, or permit the same to be removed; B. agreed that upon payment of the rent and performance of the covenants by E., he would, at the expiration of the term, sell and convey the furniture to E. In case of default on the part of E., B. was authorized to re-enter and take possession of, and to sell the furniture at auction, retaining out of the proceeds the amount of rent unpaid, paying over the surplus to E. B. subsequently transferred his interest in the lease to plaintiff, and assigned to him his interest in the furniture. Defendant's testator caused the furniture to be distrained for non payment of rent under the statute of New Jersey, which authorizes a landlord to seize for rent in arrears, within six months after the same becomes due, the goods of his tenant on the demised premises, but not those of any other person, although in the possession of the tenant. In an action for conversion of the furniture, *held*, that the transaction between B. and E. as to said furniture was a conditional sale, the title remaining in B. until performance by E.; that no such interest was transferred to E. as rendered the property subject to be distrained for rent due from him; and that the transfer from B. vested the title in plaintiff, and upon default made by E., he had a right to take possession. *Bean v. Edge.* 510

2. The fact that a lease of premises, used by a firm for copartnership purposes, is to one of the copartners does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm. *Mitchell v. Read.* 556

#### LEGACIES.

— *When chargeable on real estate.*  
*See Le Febvre v. Toole.* 95

#### LICENSE.

1. A mere license to drain is not made irrevocable by the fact that a val-

uable consideration was paid therefor. *Wiseman v. Lucksinger.* 3

2. The parties owned adjoining city lots, fronting upon a street in which there was no sewer. Defendant built an underground drain or sewer of plank from his house to a sewer in another street; he gave to plaintiff, for the consideration of \$7, a writing stating that the money was received "for the right to drain through my premises," and plaintiff thereupon built a similar drain of plank connecting with defendant's drain. After the lapse of over twenty years, plaintiff took up his drain and replaced it with a drain of tile of greater capacity than defendant's, and also made changes in his privy vault, and thereafter the filth and foul water from his privy flowed back into defendant's cellar; thereupon defendant, on his own land, cut off the connection and refused to allow plaintiff to go upon his premises to open and repair the drain. In an action to restrain defendant from obstructing the sewer and for damages, *held*, that the agreement indicated by the writing could not be inferred to be a permanent one, but it would be satisfied by regarding it as a temporary arrangement, and should be so construed; that the agreement so indicated was good as a license giving plaintiff immunity while acting under it, but giving no vested right to the use or enjoyment of the privilege; against the will of the grantor; and that, therefore, it was revocable at the pleasure of the latter. *Id.*
3. Also *held*, that twenty years' user did not give plaintiff a prescriptive right to the easement, as the possession was by consent of defendant and there could be no adverse possession until defendant cut off plaintiff's drain. *Id.*

#### LIENS.

*See* MORTGAGES.

#### LIMITATION OF ACTIONS.

A foreign corporation sued in this State cannot avail itself of the statute of limitations; and this,



although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this State, and has property and officers therein. *Boardman v. L. S. & M. S. R. R. Co.* 157

## LOST INSTRUMENTS.

— *The point that in action on lost note bond required by statute was not given, cannot be raised for first time on appeal, it must be presented by exception.*

*See Fordham v. Hendrickson. (Mem.)* 654

## LUNATICS.

*See INSANE PERSONS.*

## MARRIED WOMEN.

1. Where a married woman is the owner of stock of a bank located in a State other than that in which she and her husband are domiciled, the effect of the payment by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile. *Graham v. First Nat. Bk., Norfolk.* 393
2. E., a married woman, domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter State the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the controlling agent; with these banks the Virginia bank had accounts, kept in the name of the husband as cashier; by his direction or with his assent various dividends declared upon said shares of stock were paid to said banks or credited in their accounts and allowed them upon settlement. In an action by assignees of the wife to recover the dividends, *held*, that the evidence jus-

tified a finding of payment of the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability. *Id.*

— *The presumption that a party executing an instrument does so with knowledge of its contents not affected by the fact that the party is a married woman.*

*See Smyth v. Munroe.* 354

## MASTER AND SERVANT.

McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. *McCosker v. L. I. R. R. Co.* 77

## MEASURE OF DAMAGES.

— *In action to recover purchase-price under contract for sale of personal property measure of damages is contract-price less payments; vendor may but is not bound to sell at auction on account of vendee, although property is perishable.*

*See Hunter v. Wetsell.* 549

## MERGER.

— *In action of foreclosure, mortgage is merged in judgment and after*

entry, interest should be at rate then lawful.

See *Taylor v. Wing*. 471

#### MILITARY LAW.

1. The provision of the National Guard Act of 1870 (§ 253, chap. 80, Laws of 1870), entitling a member of the National Guard to an exemption from the assessed valuation of his property to the amount of \$1,000, during the period of his military service, was repealed by its omission from the section as amended in 1875 (§ 59, chap. 228, Laws of 1875). *People ex rel. Sears v. Bd. Assrs.* 610
2. No contract relation existed between the State and a member of the National Guard who had enlisted prior to the passage of the repealing act and whose term of service had not then expired, which would prevent it from taking effect as to him; he enlisted subject to the right of the State at any time to modify or repeal the exemption, and upon the repeal his right to the exemption, as to all subsequent assessments, ceased. *Id.*

#### MISTAKE.

1. The obligation of a party to refund money voluntarily paid to him by mistake can arise only after notification of the mistake, and demand of payment. *Southwick v. First Nat. Bk of M.* 420
2. To entitle a party to relief, on the ground of mistake, it must be a mistake as to some existing fact, not as to something to occur in the future; and it must be a mistake as to some fact bearing directly, not remotely, upon the act against which relief is sought. *Id.*

#### MORTGAGE.

1. In an action to foreclose two mortgages, it appeared that there was a prior mortgage upon the premises, the beneficiary owner whereof, in pursuance of an agree-

ment under which a fourth mortgage was executed and accepted, covenanted that said mortgage should have priority of lien over his mortgage, as if it had been previously executed and recorded. The lien of the first mortgage was subsequently discharged. *Held*, that the covenant did not give the fourth mortgage a priority of lien over plaintiff's mortgages; that the intent of the parties to the agreement under which the fourth mortgage was taken was not to place that mortgage ahead of plaintiff's mortgages, or to give its owner an interest in the first mortgage, but simply that the liens prior to the fourth mortgage should only be the amount of plaintiff's mortgages; and that the agreement was fully satisfied by a discharge of the first mortgage. *Taylor v. Wing*. 471

2. It was stipulated in plaintiff's mortgages which were executed prior to the passage of the act (Chap. 588, Laws of 1879) reducing the rate of interest to six per cent, that the principal sum should bear interest at seven per cent until paid. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due, from the date of the decision, at the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate. *Id.*
3. *It seems* that the mere fact that the purchaser of lands took subject to a mortgage does not render him liable, either legally or equitably, to indemnify his grantor against the mortgage. *Smith v. Truslow*. 660
4. *It seems*, however, the rule would be otherwise if the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchaser, or if he retained its amount. *Id.*

— *Rights of parties holding bonds*

of railroad corporation on foreclosure of mortgage securing the bonds.

*See Duncomb v. N. Y. H. & N. R. R. Co.* 190

— *Record of assignment of mortgage, constructive notice to subsequent purchasers of mortgaged premises.*

*See Smyth v. K. L. Ins. Co.* 589

See FORECLOSURE.

MOTIONS AND ORDERS.

1. Where an action has been commenced without previous authority upon guaranty of a mortgage, after the bringing of an action to foreclose the mortgage, the court may by subsequent order made *nunc pro tunc* grant permission, and so remove the impediment to the maintenance of the action founded upon the statute. *McKernan v. Robinson.* 105

2. Where an order of Special Term was "in all respects affirmed" by the General Term, *held*, that this court could only look to the order to ascertain the ground upon which the court below proceeded. *Direct U. S. Cable Co. v. Dom. Tel. Co.* 153

3. Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 R. S. 28, § 1 *et seq.*), contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings. *Develin v. Cooper.* 410

4. It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1887 (Chap. 361, Laws of 1887) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted. *Bassett v. Wheeler.* 466

5. Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the question was not reviewable here. (Code of Civil Procedure, § 1337.) *Id.*

6. Where an order is made by this court on appeal from a judgment, reversing the judgment, with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal. *First Nat. Bk. of M. v. Fourth Nat. Bk.* 469

7. Where a plaintiff in an action for partition dies after argument at General Term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the General Term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. *Bergen v. Wyckoff.* 659

— *An order involving a question of jurisdiction, reviewable here.*  
*See Blossom v. Estes.* 615

NATIONAL BANKS.

1. Where a question arises under a Federal law and respects a corporation created by its authority, the rulings of the Federal courts must be followed. *Duncomb v. N. Y. H. & N. R. R. Co.* 190

2. Accordingly *held*, that the decision of the United States Supreme Court, in *G. M. Co. v. Nat. Bank* (96 U. S. 64) was conclusive here, holding that a contract of loan made by a National bank was valid and could be enforced although violative of the provision of the National Banking Act (U. S. R. S., § 5200), prohibiting a loan to one individual exceeding one-tenth part of the capital of the bank. *Id.*

NATIONAL GUARD.

*See MILITARY LAW.*

## NEGLIGENCE.

1. Plaintiff's cattle were transported by defendant from B. to W. A. under a contract which provided, among other things, that in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff should load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle being without food were injured. In an action to recover damages for the injury, *held*, that defendant was not bound to unload the cattle when the train was stopped; but that it was its duty, upon reasonable request, to so place the cars in which the cattle were as to be convenient to the usual and accessible means of unloading, if practicable, and for a failure so to do it was liable. *Bills v. N. Y. C., etc., R. R. Co.* 5
2. Plaintiff's agent made such a request: the engine drawing the train was disabled; it appeared, however, that defendant had engines at U., forty-three miles distant; also that other motive power might have been readily obtained. The court, after referring to the evidence on this subject and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance if help could readily have been obtained. *Held*, no error; and that this was so, even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. *Id.*
3. The engine of the train was disabled by the engineer running it into the water, and there was evidence tending to show negligence on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload was not to be excused by an absence of motive power. *Held*, no error; that defendant could not plead its own previous negligence as an excuse for its inability to perform a distinct and affirmative duty. *Id.*
4. An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State through the negligence of the defendant, where it appears that the laws of that State are similar to those of this State giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same. *Leonard v. Col. S. Nav. Co.* 48
5. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge when crossing it in the night. Defendant had placed gates over the footway on each end of the draw which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. M., a boy in defendant's employ, was called as a witness for it, and after testifying on cross-examination that he had been sent at times to pull down the gate, was asked if he told one B. on one occasion to pull it down. This was objected to and excluded. *Held*, no error. *Hart v. H. R. Bridge Co.* 56
6. M. testified that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say in the presence of people at the draw, when the subject was discussed just after the splash in the water which he heard, that he saw the woman fall from the end of the bridge. One N. was called as a witness for plaintiff, who testified that he saw a boy among those gathered on the

- bridge after the draw was closed, but could not identify M. as the one. Plaintiff's counsel then offered to prove that the boy said he saw a woman fall off the bridge; this was excluded; *held*, no error; that the question as to the identity of M. with the boy whom N. saw was for the court to determine; also that the attention of M. was not called with sufficient particularity to the time, place, persons, etc., to lay a foundation for the impeaching evidence. *Id.*
7. A civil engineer having experience in the erection of bridges, as a witness for defendant, was allowed to testify, under objection and exception, that it was not customary to have gates of any kind on draw-bridges. *Held*, no error; that it was competent for the defense to show that the bridge was constructed with extraordinary care. *Id.*
8. The same witness was asked, on cross-examination, whether it was safe and proper to have draws with drop-gates across the footpath of a bridge when the draw was open; this was objected to and excluded. *Held*, no error; that it was a matter of opinion and not within the range of expert evidence. *Id.*
9. The court charged that if the jury believed that the gate was not entirely closed, but the bottom of it was two and a half feet from the bridge floor, the plaintiff could not recover. *Held*, no error. *Id.*
10. Upon the question of contributory negligence the court charged: "It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon plaintiff to satisfy you that there was no contributory negligence on the part of the deceased." *Held*, no error. *Id.*
11. McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. *McCosker v. L. I. R. R. Co.* 77
12. A passenger, when taking or leaving a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty which requires it to provide passengers a safe passage to and from the train. *Brassell v. N. Y. C., etc., R. R. Co.* 241
13. A passenger, therefore, is not, in all cases, liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. *Id.*
14. Defendant ran a train upon its road daily from S. to E. S., primarily for the purpose of carrying its employees to E. S., where it had a machine shop and freight-house; it carried, however, on this train persons going as ordinary passengers, on payment of fare, and it was in charge of a uniformed conductor. There was a station-house at E. S., on the south side of the road; this train did not stop at the station, but at a point 1,800 feet further east, opposite the freight-house located north of the road. At this point there were about twenty tracks; the road was not planked and there was nothing to indicate on which side passengers should

leave the train. E., plaintiff's intestate, a girl seventeen years of age, took this train, in company with an old lady, at S. to go to E. S., where she resided. The train stopped at the usual place on the third track from the south. The two south tracks were used for ordinary passenger trains. E. got off on the south side of the train and assisted her companion to alight. There was a path about seventy feet west leading south to or near the house where she was employed, which was south of the road. The two walked a few steps in a south-westerly direction until they reached the second track, when a passenger train from the east, which was behind time and running thirty-five or forty miles an hour, struck and killed them both. In an action to recover damages the evidence tended to show that they did not look to the east after leaving the car, and that if they had done so they could have seen the approaching train; also that no person connected with the train gave any instructions to passengers where to alight or any warning of the approaching train. *Held*, that the fact that the deceased did not look, while it was a material and important one for the consideration of the jury upon the point of contributory negligence, did not establish it as matter of law; and that a refusal of the court to charge that it was *per se* negligence was not error. *Id.*

15. Plaintiff's testator was, by the invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful

and willful act." Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar the plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient. *Masleron v. N. Y. C., etc., R. Co.* 247

16. Defendant landed passengers from its ferry boats by means of a float or bridge, between each side of which and the adjoining pier was a space of from eight to twelve inches, left for the movement of the bridge under the action of the tide and the impact of the boats on entering the slip. On each side was a guard, with a sill along the outer line of the passage-way rising six or eight inches from the floor of the bridge which was spanned by an arched rail, at the center about three feet above the sill, supported by stanchions in the sill about six feet apart. Between the sill and this rail was another rail twenty or twenty-two inches above and parallel with the sill. Plaintiff's intestate, a child six years old, while leaving one of defendant's boats, in passing over this bridge, fell through one of the openings in the guard into the water and was drowned. In an action to recover damages it appeared that the bridge had been constructed five or six years before the accident and was similar to bridges at other ferries of the defendant over which millions of people passed annually and no similar accident had previously happened. *Held*, that defendant was not chargeable with any actionable negligence; and that a verdict for plaintiff was properly set aside. *Loftus v. Un. Ferry Co., Brooklyn.* 455

17. In an action to recover damages for alleged negligence proof of the violation of a city ordinance does not establish negligence *per se*; it is competent evidence upon the question to be submitted to the jury, but not conclusive. *Knappfe v. Knick. Ice Co.* 488

— What does not amount to neg-

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*See Riceman v. Havemeyer. (Mem.)* 647

NEW YORK (CITY OF).

1. Where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation, *held*, that such real estate was not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act. *Roosevelt Hospital v. Mayor, etc.* 108

2. In an action to vacate such an assessment, imposed in 1873, it appeared that the land had been assessed for the purposes of taxation in 1866, at which time it belonged to plaintiff. *Held*, that this was a sufficient basis for an assessment within the provision of the act of 1840 (§ 7, chap. 326, Laws of 1840), prohibiting an assessment for a local improvement exceeding half the value of the property as valued by the general tax-assessing officers. *Id.*

3. The assessment was for the construction of a sewer. It appeared that a general plan of sewerage for the district had been adopted and a map had been filed as prescribed by the act of 1865 (§ 2, chap. 381, Laws of 1865), upon which map the sewer in question did not appear. *Held* (RAPALLO and EARL, JJ., dissenting), that this alone did not vitiate the assessment; that when the needs of a district or any part of it, after a plan had been so adopted, required another sewer, the construction of it was authorized by the provision of said act (§ 4) permitting "such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue, or part thereof, in said district or otherwise;" that to invalidate the assessment it must be shown, either that the sewer does

not accord in its characteristics with the general plan or that there has been no general plan devised, mapped and filed. *Id.*

4. Under the New York city charter of 1873 (§ 71, chap. 335, Laws of 1873), the commissioner of public works, being charged with the care of the public buildings, has power to appoint janitors of the buildings in which the district civil courts are held; the common council cannot appoint, nor can it delegate to the justices of said court the power to appoint a janitor to take charge of any of the public buildings. *Fagan v. Mayor, etc.* 348

5. Plaintiff was appointed by said commissioner janitor of the building in which the sixth district civil court in said city held its sessions. Defendant C. was appointed janitor by the justice of said court under a resolution of the common council authorizing the justices of said courts to appoint janitors for their courts. The board of estimate and apportionment made an appropriation to pay the salary of one janitor of said court, with the condition, however, that no portion should be paid by the comptroller until the question was judicially determined, in whom, by law, the appointment of janitors was placed; and that "the city is not to be burdened with the expense of two sets of janitors." *Held*, that the appointment of plaintiff was valid; that this was a proper case for impleading C. as an adverse claimant, with the city; that C. had no lawful appointment; that no distinction could be recognized between a janitor of the court and a janitor of the building in which the court is held, and but one janitor could legally serve; and that, therefore, plaintiff alone was entitled to payment out of the appropriation. *Id.*

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- portant item of a contemplated work. *In re Merriam.* 596
7. Where in the advertisement for proposals for constructing a sewer a price was fixed for rock excavation which constituted a large portion of the work, *held*, that this was a violation of the charter, and that an assessment for the work was so far void. *Id.*
  8. But *held* that such error furnished no ground for vacating the whole assessment; that a case was presented for a deduction of the objectionable item as authorized by the act of 1870 (§ 27, chap. 383, Laws of 1870). *Id.*
  9. The provision of said act of 1870, allowing the modification of assessments by making such deductions was not repealed by the act of 1874 (Chap. 312, Laws of 1874), in relation to taxes and assessments in said city. *Id.*
  10. The advertisement and the contract required the purchase by the contractor from the city of sewer and culvert pipe at specified prices; said pipe had been purchased by the city under contract let at a public bidding and was furnished by the city at the contract-price. *Held*, that this provision was proper and lawful. *Id.*
  11. *It seems* that surveyors' fees are properly included as an item of expense of such a work. *Id.*
  12. By the contract the right was reserved to the commissioner of public works to increase or diminish the gross length of the sewers, culverts and drains, the number of basins or piles or the amount of foundation plank, or any other item. *Held*, that in the absence of proof of fraud, this did not impair the validity of the contract. *Id.*
  13. The *onus* of establishing a substantial error in an assessment devolves upon the party making objection thereto and must be proved by affirmative evidence. *Id.*
  14. Accordingly *held*, that an objection that the entire cost of the work was assessed when no more than one-half thereof was assessable upon adjacent property under the act of 1865 (§ 8, chap. 565, Laws of 1865), could not be entertained in the absence of proof of what was the entire cost of the work; that it could not be presumed, in the absence of evidence to establish it, that more than one-half of the expense was assessed. *Id.*
  15. *It seems* that said act of 1865 has reference to the laying out of streets, not to the construction of sewers. *Id.*
  16. Also *held*, that an objection that the assessment was illegal because made up and notice published by three of the assessors, not by the full board, was not tenable in the absence of proof that all four were not present or that the fourth did not have notice of the meeting, or that a vacancy, which had been occasioned by the death of one of the assessors, had been filled at the time of the assessment. *Id.*
  17. So, also *held*, that proof that a member of the board of revision was absent did not sustain the objection that the assessment was not legally confirmed. *Id.*
  18. An omission to award damages as prescribed by the act of 1852 (§ 3, chap. 52, Laws of 1852), for injuries sustained by reason of a change of the grade of a street in the city of New York, is not a "substantial error" in an assessment for the work within the meaning of the act (chap. 338, Laws of 1858, as amended by chap. 312, Laws of 1874) authorizing the vacating of assessments for such errors. *In re Cruger.* 619
  19. An objection that the assessors acted on an erroneous principle in making the assessment is not tenable; it is a matter of judgment on their part and an error, if any, is not an error in the proceedings and is not a subject for review under the statute. *Id.*

20. So, also, an objection that the area of assessment for benefit was too small is untenable, as that matter is committed to the assessors and the board of revision, and the exercise of their discretion in this respect cannot be reviewed on such motion. *Id.*

### NON-RESIDENT.

A foreign creditor rightfully in a court of this State, pursuing a remedy given by the statutes of the State, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as a citizen. *Hibernia Nat. Bk. v. Lacombe.* 367

### NOTICE.

1. An association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard. *Wachtel v. Noah, etc., Soc.* 28

2. *It seems* that in the absence of any agreement by the members or any provision in the charter or by-laws for a different mode of service, notice should be served personally. *Id.*

— *Record of assignment of mortgage, constructive notice to subsequent purchasers of mortgaged premises.*  
*See Smyth v. K. L. Ins. Co.* 589

### PARTIES.

1. Under the provision of the Code of Procedure (§ 427) authorizing the bringing of an action against a foreign corporation by "a resident of this State for any cause of action," *held*, that an action was properly brought in this State by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that State, the will having been admitted to pro-

bate in that State, and afterward, upon production to the surrogate of an authenticated copy having been admitted to probate in this State. *Palmer v. Phoenix M. L. Ins. Co.* 63

2. An action to recover real property is not within the purview of the act of 1875 (Chap. 49, Laws of 1875), authorizing actions to be brought by the people of the State to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the act is to be construed as referring to property of the same general character. *People v. N. Y. & M. B. R. Co.* 565

— *When a defendant likely to be vexed by conflicting claims, may have remedy by action of interpleader, or by having other claimants brought in.*  
*See Dows v. Kidder.* 121

### PARTITION.

1. *It seems* that the provision of the Code of Civil Procedure (§ 451), in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition. *Bergen v. Wyckoff.* 659

2. Where a plaintiff in an action for partition dies after argument at General Term, and before decision of an appeal from an order requiring a purchaser on sale under the judgment to complete his purchase, the General Term has power to direct its order to be entered *nunc pro tunc*, as of a day prior to the death. *Id.*

### PARTNERSHIP.

1. The fact that a lease of premises, used by a firm for copartnership purposes, is to one of the copart-

ners does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm. *Mitchell v. Read.* 556

2. M., plaintiff's testator, and defendant were formerly partners carrying on a hotel, the leases for which expired at the time fixed for the termination of the partnership. Prior to that time defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the leases declared and adjudged. It appeared that during the pendency of the action M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase-price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, goodwill and leases if put up for sale together would have brought, the partners each having a right to bid at the sale. *Held*, no error. *Id.*

#### PAYMENT.

1. E., a married woman domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter State the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the controlling agent; with

these banks the Virginia bank had accounts kept in the name of the husband as cashier; by his direction or with his assent various dividends declared upon said shares of stock were paid to said banks or credited in their accounts and allowed them on settlement. In an action by assignees of the wife to recover the dividends, *held*, that the evidence justified a finding of payment of the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability. *Graham v. First Nat. Bk. of Norfolk.* 393

2. As to whether payment of a debt by a stranger is a satisfaction, *quære.* *Wellington v. Kelly.* 543
3. Where, after the making of an oral contract for the sale of goods void under the statute of frauds, a payment is made thereon, and at the time of such payment, the essential terms of the contract are restated, this takes the case out of the operation of the statute and validates the contract. *Hunter v. Wetsell.* 549
4. Where a check is delivered and received as a payment, which is good when drawn and is paid on presentation, this is a payment "at the time" within the meaning of said statute (2 R. S. 136, § 3, sub. 3), and satisfies its requirements. *Id.*

—When payment, by savings bank, of deposit of trust fund, to administrator of trustee will discharge the bank.

*See Boone v. Citizens' S. Bank.* 83

#### PLEADING.

1. Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made

by his complaint and embraced within the issue." (Code of Procedure, § 275; Code of Civil Procedure, § 1207.) *Stevens v. Mayor, etc.* 296.

2. Plaintiff's complaint alleged in substance that prior to July, 1866, he was the owner of certain premises in the city of New York, part of an old street which had been closed and a new street opened, of which fact and of his title plaintiff was ignorant; that defendant sold said premises at public auction, and thereafter applied to the plaintiff for a release and conveyance of his title at the time, "fraudulently and with intent to deceive," keeping concealed from him the facts, and falsely informing him that he had some slight claim, a mere equitable one of no value, and "that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, executed and delivered such release without any consideration." That the premises so conveyed were worth \$200,000, and judgment was demanded for that amount. The answer denied the allegations of fraud, and the referee found in favor of defendant. *Held*, that the action was one at law only, and plaintiff not having sustained the allegations of the complaint, a judgment for defendant was proper, although the case may have presented matters of equitable cognizance. *Id.*

3. Plaintiff's complaint alleged in substance that R., his intestate, being at the time of unsound mind, transferred to defendant various sums of money under an agreement, in writing, by which defendant agreed to pay to R. the interest on said money during his life, and after his death interest on the whole or a part thereof to his executor or administrator for the benefit of his widow, or directly to his widow and his sister for their benefit during their lives; that interest was paid by defendant up to

the death of R., but not since; that the sister of R. died shortly after his death; that plaintiff, after his appointment as administrator, obtained from the widow her written consent that he might surrender the written agreement, which he offered to do, and demanded a return of the moneys, which defendant refused. On demurrer to the complaint, *held*, that it stated a good cause of action; that the allegation as to unsoundness of mind was one of fact, and the contract was one that could be rescinded, *Riggs v. Am. Tract Soc.* 330.

4. Where a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic and without knowledge of his incapacity, and that it has been so far performed that said party cannot be placed in *statu quo*, these facts must be alleged and proved. *Id.*

—When allegations of fraud in complaint, in action for an accounting, do not change character of action.  
*See Harrington v. Bruce.* 103

*See COUNTER-CLAIM*

## PLEDGE.

1. Where bonds of a railroad company are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter. *Duncomb v. N. Y., H. & N. R. R. Co.* 190

2. Under the provision of the general railroad act (subd. 10, § 28, chap. 140, Laws of 1850) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds and to mortgage its property and franchises "to secure the payment of any debt contracted

for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified. *Id.*

8. Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt. *Id.*

4. Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, *held*, that such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds. *Id.*

- 5 Also *held*, that one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary, and was embraced within the authority to issue bonds. *Id.*

6. A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem, did not appear. *Held*, that as no right to sell was shown, the holder of the bonds must still be treated as pledgee. *Id.*

#### POSSESSION.

To satisfy the provision of the statute (Chap. 279, Laws of 1833, as amended by chap. 501, Laws of 1873), declaring every chattel mortgage not accompanied by immediate delivery and "followed by an actual and continued change of possession" of the mortgaged

property to be void unless the mortgage is filed, and that a mortgage so filed shall cease to be valid as against creditors after one year unless a copy be filed, etc., a constructive or legal change of possession is insufficient; the possession by the mortgagee must be actual, open and public. *Steele v. Benham.* 634

#### PRACTICE.

1. Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. *Leonard v. Col. St. Nav. Co.* 48

2. The provision of the Code of Civil Procedure (§17) authorizing a convention of the General Term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code. *Gormerly v. McGlynn.* 284

3. The provision of said Code (§1038) fixing and determining the practice as to the findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. *Id.*

4. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed, an

exception should be taken. *Muldoon v. Blackwell.* 646

5. *It seems*, that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the General Term, it is not correct practice for respondent's attorney to return the case, and, upon failure to serve others, to enter order dismissing appeal. *Bliss v. Hoggson.* 667

6. *It seems*, also, that the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed. *Id.*

— *Where allegations of complaint warrant only legal relief, plaintiff cannot have equitable relief upon the evidence.*

*See Stevens v. Mayor, etc.* 296

See PLEADING.  
TRIAL.

PREFERENCE.

*See* CALENDAR.

PRESCRIPTION.

— *Twenty years' user, under a license, of a drain, over the lands of another, does not give a presumptive right to the easement, as the possession is by consent and not adverse.*

*See Wiseman v. Lucksinger.* 81

PRESUMPTION.

1. Defendant A. executed to an insurance company his bond for \$40,000, secured by mortgage executed by him and by defendant J., his wife, upon lands owned by the latter. At the same time the mortgagors signed a written instrument in which they consented to the assignment of the mortgage to the superintendent of the insurance department, and stated that no portion of the mortgage debt

had been paid and that there was "no offset to or legal or equitable defense to the same." The insurance company became insolvent and a receiver of its effects was appointed. In an action by the superintendent to foreclose the mortgage, wherein the defense of usury was interposed, it appeared that it was the custom of the insurance department to require such statement as a condition precedent to the acceptance of assignments of mortgages, and that the instrument was taken and deposited with the other papers in the office of the superintendent. *Held*, that it was to be presumed that the superintendent acted in accepting the assignment, and as an essential part of the transaction, upon the faith of the representations in said instrument; that, therefore, a finding to that effect was justified; and that defendants were estopped from availing themselves of said defense. *Smyth v. Munroe.* 354

2. Also *held*, that in the absence of proof of fraud, or want of knowledge, it was a legal presumption that the parties executing said instrument did so with knowledge of its contents; and that this presumption was not affected by the fact that one of them was a married woman; also, that as against a person who had acted upon the faith of her representation she could not be exonerated therefrom by reason of her ignorance. *Id.*

3. In action against a sheriff for an escape of one Maxwell, an insolvent debtor, he set up a discharge. It was proved that the discharge was handed to defendant and he was asked if he would let Maxwell go; that he took time to advise with his counsel, and that the next day Maxwell was at his home beyond the jail liberties. *Held*, the presumption was that he was set free in consequence of the discharge. *Devellin v. Cooper.* 410

PRINCIPAL AND SURETY.

1. Bail are sureties with the rights and remedies of sureties in other

cases. The neglect of a creditor, upon request of a surety, to proceed against the principal discharges the surety, if thereby the debt has been lost. *Toles v. Adee.* 222

2. The death of one of two or more co-sureties does not relieve his estate from a liability to contribute; the law implies a contract between the sureties originating at the time they executed the obligation by which they became such, to contribute ratably toward discharging any liability which they incur in behalf of their principal; and in case of the death of either, the obligation devolves upon his legal representatives the same as any other contract made by him, the breach of which occurs after his death. *Johnson v. Harvey.* 363

3. The authorities holding that as against the creditor, the estate of a deceased surety who has executed a joint obligation with others is discharged, distinguished. *Id.*

#### PRIVILEGED COMMUNICATIONS.

1. The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of or in the progress of an action or judicial proceeding, but extends to those made in reference to any matter which is the proper subject of professional employment. *Root v. Wright.* 72
2. Where communications are made to an attorney by either of two or more parties in the presence of the others, while employed as their common attorney to give advice as to matters in which they are mutually interested, the said rule prohibits him from testifying to such communications in an action between his clients and a third person. *Id.*

#### PUBLIC POLICY.

*It seems* public policy requires that officers armed with bailable pro-

cess for the arrest of defendants should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements. *Toles v. Adee.* 222

— *Where contract to furnish evidence to sustain a defense not void as against public policy.*

*See Wellington v. Kelly.* 543

#### QUESTIONS OF LAW AND FACT.

In an action to recover the purchase-price of goods alleged to have been sold, to arrive, by plaintiffs to defendants, through a broker, it appeared that the broker entered the contract of sale in his book, made two copies thereof, one of which he delivered to the plaintiffs and sent the other by his clerk to the defendants in the usual course of business; that subsequently the broker had a conversation with one of the defendants as to the purchase, and informed him that he had executed the broker's note—that after the arrival of the goods defendants requested plaintiffs to enter the goods at the custom house in bond, which they did and then sent defendants an order for the goods and an account of the sale, to which no objection was made; that defendants made arrangements with warehousemen to store the goods, stating they had bought them, and that subsequently they rejected the goods on the ground that the quality was inferior to that contracted for. The defendants did not deny, as witnesses, the receipt of the broker's note. *Held*, that the evidence of such receipt was sufficient to require the submission of that question to the jury; and that a nonsuit was error. *Newberry v. Wall.* 576

— *When question of contributory negligence one of fact.*

*See Brassell v. N. Y. C. & H. R. R. Co.* 241

— *When question of negligence one of law.*

*See Riceman v. Havemeyer. (Mem.)* 647



## RAILROAD CORPORATIONS.

1. McC., plaintiff's intestate, was employed in the yard of defendant at H. P. to assist the yardmaster L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages, *held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable. *McCosker v. L. I. R. R. Co.* 77

2. Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears before the holders of common stock are entitled to any thing. *Bourdan v. L. S. & M. S. R. R. Co.* 157

3. In 1857 the M. S. & N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also to share *pro rata* with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. Said company was consolidated with defendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock.

In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. S. & N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction. *Id.*

4. The resolution of the directors declared that dividends on the stock authorized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock. *Id.*

5. There was no proof of plaintiffs' title to the preferred stock except the certificate issued to plaintiffs' testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that plaintiffs' stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners. *Id.*

6. Plaintiffs' testator did not become owner of the stock until 1862. *Held*, that the transfer to him carried with it all right to the unpaid dividends. *Id.*

7. The complaint asked and the judgment directed a specific performance of the contract and restrained defendant from paying dividends upon that portion of its common stock which represented

- the common stock of the M. S. & N. I. R. R. Co. until the amount of the arrears was paid. *Held*, no error; that plaintiff was entitled to the equitable relief granted. *Id.*
8. Also *held*, that an action was maintainable against defendant alone as the representative of the corporation with which the contract was made. *Id.*
9. Also *held*, that, as the claim was originally against a foreign corporation and as the articles of consolidation by which defendant assumed the obligation took effect within six years of the commencement of the action, the statute of limitations did not run against plaintiffs' claim; also that as it did not appear that any action on the part of defendant was induced by the delay in prosecuting said claim, plaintiff was not estopped by such delay. *Id.*
10. The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation. *Duncombe v. N. Y. H. & N. R. R. Co.* 191
11. But as he may be the lawful holder of such bonds, knowledge upon the part of the purchaser from him for value and in good faith of bonds so bought that he is a director does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title. *Id.*
12. Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter. *Id.*
13. Under the provision of the general railroad act (subd. 10, § 28, chap. 140, Laws of 1860) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds and to mortgage its property and franchises "to secure the payment of any debt contracted for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified. *Id.*
14. Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt. *Id.*
15. The L. & I. Co. by its charter (§ 5, chap. 730, Laws of 1871) is authorized to "advance moneys \* \* \* upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced. *Id.*
16. Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, *held*, that such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds. *Id.*
17. Also *held*, that one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary and was embraced within the authority to issue bonds. *Id.*
18. A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem, did not appear. *Held*, that as no right to sell was shown the

holder of the bonds must still be treated as pledgee. *Id.*

19. A passenger, when taking or leaving a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty which requires it to provide passengers a safe passage to and from the train. *Brasell v. N. Y. C. & H. R. R. Co.* 241.

20. A passenger, therefore, is not, in all cases, liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. *Id.*

21. Defendant ran a train upon its road daily from S. to E. S., primarily for the purpose of carrying its employees to E. S., where it had a machine shop and freight-house; it carried, however, on this train persons going as ordinary passengers, on payment of fare, and it was in charge of a uniformed conductor. There was a station-house at E. S., on the south side of the road; this train did not stop at the station, but at a point 1,300 feet further east, opposite the freight-house located north of the road. At this point there were about twenty tracks; the road was not planked and there was nothing to indicate on which side passengers should leave the train. E., plaintiff's intestate, a girl seventeen years of age, took this train, in company with an old lady, at S. to go to E. S., where she resided. The train stopped at the usual place on the third track from the south. The two south tracks were used for ordinary passenger trains. E. got off on the south side of the train and assisted her companion to alight. There was a path about seventy feet west leading south to or near the house where she was employed, which was south of the road. The two walked a few steps in a south-westerly direction until they reached the second track, when a passenger train from the east, which was behind time and running thirty-five or forty miles an hour, struck and killed them both.

In an action to recover damages the evidence tended to show that they did not look to the east after leaving the car, and that if they had done so they could have seen the approaching train; also that no person connected with the train gave any instructions to passengers where to alight or any warning of the approaching train. *Held*, the fact that the deceased did not look, while it was a material and important one for the consideration of the jury upon the point of contributory negligence, did not establish it as matter of law; and that a refusal of the court to charge that it was *per se* negligence was not error. *Id.*

22. A railroad corporation is not relieved from the duty imposed upon it by the general railroad act (sub. 5, § 28, chap. 140, Laws of 1850) to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness" by the fact that a street railway company whose road runs along the highway is obligated to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to or duties imposed upon others. *Masterson v. N. Y. C. & H. R. R. Co.* 247

23. Plaintiff's testator was, by the invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful and willful act. Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar the

plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient. *Id.*

24. The provision of the general railroad act (§ 28, chap. 140, Laws of 1850), giving to every railroad company authority to construct its road across any street or highway which the route of its road shall intersect, was not repealed by implication by the acts of 1869 and 1874, providing for the laying out of highways or avenues, known as "Ocean Parkway" (Chap. 861, Laws of 1869; chap. 583, Laws of 1874), so far as it pertains to those highways; they are highways within the meaning of the railroad act, and railroads have the same authority to cross them as they have to cross other highways. *Stranahan v. Sea View R. Co.* 308

25. The act of 1871 (Chap. 609, Laws of 1871), declaring that "no railway upon which locomotive steam shall be used or is or shall be authorized or intended to be used as a motive power" shall be constructed across certain avenues therein mentioned, without the approval of the State engineer, has no application to that portion of "Ocean Parkway" constructed under said act of 1874. *Id.*

26. The said act of 1871 has reference to railroads moving cars in the ordinary way by means of locomotive engines, it does not include railways moving their cars by a propelling rope or cable attached to stationary power. *Id.*

27. Accordingly *held*, that a railroad corporation organized under the act of 1866 (Chap. 697, Laws of 1866), for the purpose of constructing an elevated railroad to be operated "by means of a propelling rope or cable attached to stationary power," had authority under the said provision of the general railroad act, which by said act of 1866 is made applicable to corporations organized under it, to cross that portion of "Ocean Parkway" constructed under the act of 1874, which was intersected by the route of its road. *Id.*

28. The act of 1877 (Chap. 167, Laws of 1877) in relation to criminal offenses committed on railroads, providing that for any crime or offense committed within this State \* \* \* "in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offense of receiving with guilty knowledge goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed. *People v. Dowling.* 478

29. The provision of the act of 1853 in reference to the foreclosure of railroad mortgages (§ 2, chap. 502, Laws of 1853), which provides that a stockholder of a railroad company may, within six months after a sale of its road under foreclosure, on paying to the purchaser a proportion of the price paid equal to the proportion his stock bears to the whole stock of the company, have the same relative amount of stock or interest in the company, its road, franchises and other property, etc., was repealed by the act of 1854, amending the general railroad act (Chap. 282, Laws of 1854), and by the act of 1874 (Chap. 430, Laws of 1874), "to facilitate the reorganization of railroads sold under mortgages," etc. *Pratt v. Munson.* 582

—*Railroad corporations, liability of, as common carriers.*

*See Bills v. N. Y. C. R. R. Co.* 5

*See STOCK.*

## RECEIVER.

1. By the appointment of a receiver in a foreclosure suit the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them. *Rider v. Bagley.* 461

2. *It seems that, assuming the court has power to compel such owner to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here.* *Id.*

3. So, also, where fraud or contempt upon the Supreme Court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. *Id.*

#### RECEIVING STOLEN GOODS.

The act of 1877 (Chap. 167, Laws of 1877) in relation to criminal offenses committed on railroads, providing that for any crime or offense committed within this State \* \* \* "in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offense of receiving with guilty knowledge goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed. *People v. Dowling.* 478

#### RECORDING ACT.

— *Record of assignment of mortgage, constructive notice to subsequent purchasers of mortgaged premises.*  
*See Smyth v. K. L. Ins. Co.* 589

#### RECOVERY OF POSSESSION OF PERSONAL PROPERTY.

*See CLAIM AND DELIVERY.*

#### RECOVERY OF POSSESSION OF REAL PROPERTY.

*See EJECTMENT.*

#### REFERENCE.

This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them in fraud of the rights of the lunatic. *Held*, that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character; and that an order of reference was not reviewable here. *Harrington v. Bruce.* 103.

— *When action to recover damages for breach of contract is referable.*  
*See Chambers v. Appleton. (Mem.)* 649

— *A justice of the Supreme Court who has confirmed report of referee in reference under the statute of disputed claim, against estate disqualified by State Constitution (Art. 6, § 8) from sitting at General Term in review of decision.*

*See Duryea v. Traphagen. (Mem.)* 652

#### REMEDY.

Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal. *Leonard v. Col. S. Nav. Co.* 48

— *When a defendant likely to be vexed by conflicting claims may have remedy by action of interpleader or by having other claimants brought in.*  
*See Dows v. Kidder.* 121

#### RULES.

1. The provision of the Code of Civil Procedure (§ 17) authorizing a convention of the General Term justices and the chief judges of

the Superior Court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the Code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the Code. *Formerly v. McGlynn.*

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2. The provision of said Code (§ 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of rule 32 as it stood prior to the last amendment (adopted December 17, 1880; went into effect March 1, 1881), which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. *Id.*

## SALES.

1. Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defend-

ants refused. At that time they had in their hands of the purchase-price of the exchange more than the value of the corn. In an action for the conversion of the corn, the defense was that defendants bought and paid for the corn in good faith without notice; *held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiff's demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a portion of the purchase-money before notice of plaintiffs' claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment. *Dows v. Kidder.* 121

2. B., who had leased a hotel in New Jersey of defendant's intestate, and who owned the furniture, leased the hotel and furniture for the unexpired term to E. for a sum specified in addition to the rent as it accrued under the lease to B. E. agreed to keep the furniture insured, and not to sell, remove, or permit the same to be removed; B. agreed that upon payment of the rent and performance of the covenants by E., he would, at the expiration of the term, sell and convey the furniture to E. In case of default on the part of E., B. was authorized to re-enter and take possession of, and to sell the furniture at auction, retaining out of the proceeds the amount of rent unpaid, paying over the surplus to E. B. subsequently transferred his interest in the lease to plaintiff, and assigned to him his interest in the furniture. Defendant's testator caused the furniture to be distrained for non-payment of rent under the statute of New Jersey, which authorizes a landlord to seize for rent in arrears, within six months after the same becomes

- due, the goods of his tenant on the demised premises, but not those of any other person, although in the possession of the tenant. In an action for conversion of the furniture, *held*, that the transaction between B. and E. as to said furniture was a conditional sale, the title remaining in B. until performance by E.; that no such interest was transferred to E., as rendered the property subject to be distrained for rent due from him; and that the transfer from B. vested the title in plaintiff, and upon default made by E., he had a right to take possession. *Bean v. Edge.* 510
3. Where, after the making of an oral contract for the sale of goods void under the statute of frauds, a payment is made thereon, and at the time of such payment the essential terms of the contract are restated, this takes the case out of the operation of the statute and validates the contract. *Hunter v. Welsell.* 549
4. Where a check is delivered and received as payment, which is good when drawn and is paid on presentation, this is a payment "at the time" within the meaning of the statute (2 R. S. 136, § 8, sub. 3), and satisfies its requirements. *Id.*
5. Where, under a contract of sale of personal property, the place of delivery was to be designated by the vendee, *held*, that a tender was not required on the part of the vendor before action to recover the purchase-price; that readiness and an offer to deliver were sufficient. *Id.*
6. The measure of damages in such an action is the contract-price less payments made thereon. *Id.*
7. The vendor may, but is not bound to sell the property at auction after due notice and on account of the vendee; he may abandon the property, treat it as the vendee's and sue the latter for the contract-price. *Id.*
8. That the property was perishable does not affect the question. *Id.*
9. A broker's note or memorandum of sale of goods, containing the names of the vendor and vendee and the terms of sale, and delivered to both parties, makes a valid contract of sale within the statute of frauds. *Newberry v. Wall.* 576
10. In an action to recover the purchase-price of goods alleged to have been sold to arrive, by plaintiffs to defendants, through a broker, it appeared that the broker entered the contract of sale in his book, made two copies thereof, one of which he delivered to the plaintiffs and sent the other by his clerk to the defendants in the usual course of business; that subsequently the broker had a conversation with one of the defendants as to the purchase, and informed him that he had executed the broker's note; that after the arrival of the goods defendants requested plaintiffs to enter the goods at the custom house in bond, which they did and then sent defendants an order for the goods and an account of the sale, to which no objection was made; that defendants made arrangement with the warehousemen to store the goods, stating they had bought them, and that subsequently they rejected the goods on the ground that the quality was inferior to that contracted for. The defendants did not deny, as witnesses, the receipt of the broker's note. *Held*, that the evidence of such receipt was sufficient to require the submission of that question to the jury; and that a nonsuit was error. *Id.*

See JUDICIAL SALES.

SATISFACTION.

As to whether payment of a debt by a stranger is a satisfaction, *quære.* *Wellington v. Kelly.* 548

SAVINGS BANKS.

S. deposited with defendant, a savings bank, a certain sum of money,

receiving a pass-book, which stated that the account was with her, "in trust for Christopher Boone," plaintiff's intestate. S. received the pass-book and drew out one year's interest. After her death defendant paid the amount to her administrator, upon production of his letters of administration and of the pass-book. In an action to recover the deposit, *held* that, in the absence of any notice from the beneficiary, the payment was good and effectual to discharge the defendant; that the deposit constituted S. trustee and transferred the title to the fund from her individually to her as such trustee; that, upon the death of S., her rights as trustee to demand and receive the fund devolved upon her administrator, and upon his demand defendant was bound to pay it over; it had no right to inquire into the nature of the trust, and owed no duty to the beneficiary until the latter by notice, by forbidding payment or by demanding it himself, created such right and duty. *Boone v. Citizens' Sogs. Bk.* 83

#### SERVICE (AND PROOF OF).

1. Under the provision of the Code of Civil Procedure (§ 426, sub. 3) which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge; when a sheriff has an office in the city or village where the County Courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 R. S. 285, § 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. *Dunford v. Weaver.* 445
2. Under the Code of Civil Procedure (§ 426), to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons,

within the State, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient. *Ingersoll v. Mangam.* 623

3. A guardian *ad litem* can only be regularly appointed for such a defendant after service of summons personally or by the substituted mode of service prescribed. *Id.*
4. An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the Code (§ 424) which provides that such an appearance shall be equivalent to personal service of the summons. *Id.*
5. It seems that the provision of the Code of Civil Procedure (§ 451) in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition. *Bergen v. Wyckoff.* 659

#### SET-OFF.

1. The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted to plaintiff. In an action to recover the amount so retained, *held*, that defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the



benefit of those for whom the mon-  
eys were received. *Falkland v. St.*  
*N. National Bk.* 145

2. A State by coming into court as a  
sutor does not subject itself to an  
affirmative judgment upon a set-  
off or counter-claim. *People v.*  
*Dennison.* 272

# SHERIFFS.

1. *It seems* also the fact, that, under  
our practice, bail taken by a sher-  
iff on discharging a defendant from  
arrest stands in some sense both as  
bail to the sheriff and bail to the  
action, does not affect the applica-  
tion of the statute making void  
obligations taken *colore officii* in  
any other case or manner than as  
provided by law (2 R. S. 286, § 59)  
when the undertaking contains  
conditions not prescribed by law;  
nor is it in the power of the plain-  
tiff afterward to adopt the act of  
the sheriff and thereby avoid the  
effect of the illegality. *Toles v.*  
*Adee.* 222

2. *It seems* also the validity of the  
security is not dependent upon  
the question whether it was vol-  
untarily given or was extorted by  
actual duress and oppression. *Id.*

3. Where, however, the sheriff, after  
an arrest had been made, under an  
order which specified, as prescribed  
by the Code of Procedure (§ 183),  
the sum for which defendant should  
be held to bail, and after declining  
to accept a bond executed by one  
instead of by two or more suffi-  
cient bail as prescribed by said  
Code (§ 187), did agree, at defend-  
ant's solicitation, to take to plain-  
tiff's attorneys an undertaking exe-  
cuted by one in double the amount  
specified in the order, and if it  
should be approved and accepted  
by them, that defendant should be  
discharged, the latter agreeing that  
if they should decline to accept  
he would, on being notified, give  
a new undertaking, as prescribed  
by the Code, and in the meanwhile  
should remain in the custody of his  
bail, and where said attorneys ac-  
cepted the undertaking so executed

*held*, that the undertaking, when  
thus accepted, might be regarded  
as an agreement made between the  
parties to the action, and not as an  
undertaking taken by the sheriff  
under claim or in the exercise of  
official authority; and that so con-  
sidered it became operative and  
binding, though not as a statutory  
obligation. *Id.*

4. Where an order of discharge ex-  
empting a debtor from imprison-  
ment for any prior debt, purport-  
ing to be issued under the article  
of the Revised Statutes in relation  
to the exoneration of insolvent  
debtors from imprisonment (2 R.  
S. 28, § 1 *et seq.*), contains recitals  
of all the facts needed to give ju-  
risdiction to the officer granting it,  
the order alone will protect a sher-  
iff acting under it, in the absence  
of proof of knowledge, on his part,  
of any defects in the proceedings.  
*Devellin v. Cooper.* 410

5. If the order omits a recital of any  
necessary fact the sheriff will be  
protected if he can show *alibunde*  
the existence of the fact. *Id.*

6. In an action against a sheriff for  
an escape, wherein he justified  
under a discharge granted by the  
county judge of the county of Suf-  
folk, which contained a recital  
that "Frederick Maxwell, the  
debtor, of the town of Southold,  
in the county of Suffolk, did pre-  
sent a petition." *Held*, that the  
recital was sufficient proof of the  
place of residence, and that proof  
thereof was made to the officer  
granting it. *Id.*

7. Under the provision of the Code  
of Civil Procedure (§ 426, sub. 3)  
which authorizes the service of a  
summons in an action against a  
sheriff by delivering it at his office  
during office hours to his deputy,  
clerk or other person in charge;  
when a sheriff has an office in the  
city or village where the County  
Courts are held, delivery of a sum-  
mons at such office to a person in  
charge is a good service, although  
the sheriff has omitted to file a no-  
tice of the place in the county  
clerk's office, as required by the

statute (2 R. S. 285, § 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. *Dunford v. Weaver.* 445

8. Where a summons was served upon a sheriff by delivery to his deputy at his office, *held*, that an omission to prove the filing of notice on the trial, if required, was cured by the bringing of the notice to the General Term, on appeal from judgment against the sheriff. *Id.*
9. Where an action is brought against a sheriff for an escape, he cannot set up an error in the process under which the arrest was made which renders it simply voidable, not void. *Id.*
10. Where a sheriff is sued for an escape from custody under an attachment, issued by a surrogate, the plaintiff is entitled to recover the damages sustained by him (Code of Civil Procedure, § 158), to wit: the sums awarded to him by the surrogate's decree, with interest from its date. *Id.*
11. The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial. *Held*, that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provision of the Code of Civil Procedure (§ 158) in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. *Id.*
12. In such an action the fact of the insolvency of the debtor is no defense. *Id.*
13. The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which on payment were assigned to plaintiff. *Held*, that this was not a payment and extinguishment of the claims. *Id.*
14. Two attachments were issued by the surrogate and arrests made before said Code went into effect; the escape occurred thereafter; it was claimed that the provision of the Code did not apply. *Held* untenable, as the cause of action was, not the issuing of process and arrest, but the escape. *Id.*

#### SPECIFIC PERFORMANCE.

— *When action maintainable to compel specific performance of contract of railroad corporation to pay dividends on preferred stock.*

*See Boardman v. L. S. & M. S. R. R. Co.* 157

#### STATE.

1. A State by coming into court as a suitor does not subject itself to an affirmative judgment upon a set-off or counter-claim. *People v. Dennison.* 272

2. Authority to render a judgment against the State in one of its own courts cannot be implied but must be express. It cannot be claimed under general laws in which the State is not mentioned. *Id.*

3. Accordingly *held*, that the provisions of the Revised Statutes (2 R. S. 552, § 13) providing that civil actions or proceedings instituted in the name of the State "shall be subject to all provisions of law respecting similar suits and proceedings" instituted by individuals, save where otherwise provided, and that the State shall be liable to be nonsuited, etc., did not authorize an affirmative judgment against it on a counter-claim. *Id.*

4. Judgment was rendered upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general on appeal to this court gave the required stipulation for judgment absolute. *Held*, that this was not an assent to an affirm-

ative judgment on the counter-claim; that it waived no legal objection to the counter-claim, or immunity of the State from such a judgment. *Id.*

5. An action to recover real property is not within the purview of the act of 1875 (Chap. 49, Laws of 1875), authorizing actions to be brought by the people of the State to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the acts to be construed as referring to property of the same general character. *People v. N. Y. & M. B. R. Co.* 565

6. The said act was not intended to confer jurisdiction to review by means of an action as therein prescribed the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation or violence. *Id.*

7. Accordingly held, that an action by the people was not maintainable under said act to recover lands of a town, the title to which, it was alleged, had been wrongfully acquired, through the wrongful interference of its servants and agents with the action of a town meeting; they procuring the passage of a vote authorizing the conveyance of the lands for a grossly inadequate sum, by the action of persons not legal or qualified voters. *Id.*

STATUTES.

—2 R. S. 134, § 6.  
*See Wiseman v. Lucksinger*, 31.  
 —2 R. S. 191, §§ 153, 4.  
*See McKernan v. Robinson*, 105.  
 —Chap. 326, Laws of 1840.  
 —Chap. 381, Laws of 1865.  
*See R. Hospital v. The Mayor*, 108.  
 —Chap. 140, Laws of 1840.  
 —Chap. 780, Laws of 1871.  
*See Duncomb v. N. Y. H. & N. R. R. Co.* 190.

—2 R. S. 286, § 59.  
*See Toles v. Adee*, 222.  
 —Chap. 140, Laws of 1850.  
*See Masterson v. N. Y. O. & H. R. R. Co.* 247.  
 —1 R. S. 723, § 9.  
 —1 R. S. 725, § 35.  
*See Ham v. Van Orden*, 257.  
 —2 R. S. 552, § 13.  
*See People v. Dennison*, 272.  
 —2 R. S. 512, § 28.  
 —Chap. 101, Laws of 1879.  
*See People ex rel. v. McAdam*, 287.  
 —Chap. 140, Laws of 1850.  
 —Chap. 361, Laws of 1869.  
 —Chap. 583, Laws of 1874.  
 —Chap. 609, Laws of 1871.  
 —Chap. 697, Laws of 1866.  
*See Stranahan v. S. V. R. Co.* 308.  
 —Chap. 335, Laws of 1873.  
*See Fagan v. The Mayor*, 348.  
 —Chap. 314, Laws of 1869.  
*See Town of S. v. T. S. Bank*, 403.  
 —2 R. S. 24, § 85.  
 —2 R. S. 28, § 1.  
 —2 R. S. 35, § 2.  
 —Chap. 30, Laws of 1831.  
 —*Devlin v. Cooper*, 410.  
 —2 R. S. 285, § 55.  
 —Chap. 782, Laws of 1867.  
 —2 R. S. 221, § 6.  
*See Dunford v. Weaver*, 445.  
 —Chap. 361, Laws of 1867.  
*See Bassett v. Wheeler*, 466.  
 —Chap. 538, Laws of 1879.  
*See Taylor v. Wing*, 471.  
 —Chap. 182, Laws of 1876.  
 —Chap. 167, Laws of 1877.  
*See People v. Dowling*, 478.  
 —2 R. S. 135, § 1.  
 —2 R. S. 137, § 1.  
*See McConnell v. Sherwood*, 522.  
 —Chap. 398, Laws of 1866.  
*See Cagwin v. Town of H.*, 532.  
 —2 R. S. 136, § 3.  
*See Hunter v. Wetzel*, 549.  
 —Chap. 49, Laws of 1875.  
*See People v. M. B. R. R. Co.*, 565.  
 —Chap. 502, Laws of 1853.  
 —Chap. 282, Laws of 1854.  
 —Chap. 430, Laws of 1874.  
*See Pratt v. Munson*, 582.  
 —Chap. 335, Laws of 1873.  
 —Chap. 383, Laws of 1870.  
 —Chap. 312, Laws of 1874.  
 —Chap. 565, Laws of 1865.  
*See In re Merriam*, 596.  
 —Chap. 80, Laws of 1870.  
 —Chap. 223, Laws of 1875.  
*See People ex rel. v. Board of Assessors*, 610.

- Chap. 723, *Laws of 1866*.  
*See Blossom v. Estes*, 614.  
 —Chap. 52, *Laws of 1852*.  
 —Chap. 388, *Laws of 1858*.  
 —Chap. 312, *Laws of 1874*.  
*See In re Cruger*, 617.  
 —Chap. 279, *Laws of 1833*.  
 —Chap. 501, *Laws of 1873*.  
*See Steile v. Benham*, 634.  
 —Chap. 350, *Laws of 1871*.  
 —2 R. S. 67, § 63.  
 —3 R. S. 609, §§ 96, 98.  
*See Sheridan v. Houghton*. (Mem.)  
 643.

See ACTS OF CONGRESS.  
 FOREIGN LAWS.

#### STATUTE OF FRAUDS.

1. A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license; it can only be granted "by deed or conveyance in writing." (2 R. S. 134, § 6.) *Wiseman v. Lucksinger*. 31
2. The parol contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but with its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement. *Id.*
3. Where, after the making of an oral contract for the sale of goods void under the statute of frauds, a payment is made thereon, and at the time of such payment, the essential terms of the contract are restated, this takes the case out of the operation of the statute and validates the contract. *Hunter v. Wetsell*. 549
4. Where a check is delivered and received as a payment, which is good when drawn and is paid on presentation, this is a payment "at the time" within the meaning of said statute (2 R. S. 136, § 8, sub. 8), and satisfies its requirements. *Id.*

5. A broker's note or memorandum of sale of goods, containing the names of the vendor and vendee and the terms of sale, and delivered to both parties, makes a valid contract of sale within the statute of frauds. *Newberry v. Wall*. 576

— Action by mortgagees not maintainable against grantee upon covenant in deed to pay mortgage where deed was intended simply as a mortgage.  
*See Root v. Wright*. 72

#### STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

#### STOCK.

1. Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to any thing. *Boardman v. L. S. & M. S. R. R. Co.* 157
2. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Id.*
3. When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets including all undeclared dividends. *Id.*
4. In 1857 the M. S. & N. I. R. R. Co. issued certain preferred and guaranteed stock; the certificates therefor stated that the stock was entitled to annual dividends at the rate of ten per cent, payable semi-annually, at days specified, out of the net earnings of the company, and also to share *pro rata* with the other stock in any excess, and that the payment of the dividends was thereby guaranteed. The said company was consolidated with de-

pendant, the latter assuming its obligations. No dividends were paid upon the said stock until 1863, and the arrears were not subsequently paid although dividends were declared and paid upon the common stock. In an action to compel the payment of the back dividends, for the purpose of showing authority for the issue of the stock, the book of minutes, containing certain resolutions of the board of directors of said M. S. & N. I. R. R. Co. authorizing the issue of the preferred guaranteed stock, was offered and received in evidence under the objection that the certificate was the contract and could not be varied by other evidence. *Held*, no error; that the whole proceeding relating to the issue of the stock could be taken in connection as constituting the one transaction. *Id.*

5. The resolution of the directors declared that dividends on the stock authorized to be issued should always be paid out of any net earnings before any portion should be applied to pay dividends on the other stock. *Held*, that this was in effect the contract as expressed in the certificate; and that under it the dividends were not only preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, and in case of a failure in any year to earn profits sufficient to pay the dividends specified, they were to be paid as arrears before any dividends were paid upon the common stock. *Id.*

6. There was no proof of plaintiff's title to the preferred stock except the certificate issued to plaintiff's testator. *Held*, that in the absence of proof of the issue of other stock of this description the presumption was that the plaintiff's stock was a portion of that so authorized to be issued, and that plaintiffs were the lawful owners. *Id.*

7. Plaintiff's testator did not become owner of the stock until 1862. *Held*, that the transfer to him carried with it all right to the unpaid dividends. *Id.*

## STOCKHOLDER.

Where a married woman is the owner of stock, of a bank located in a State other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile. *Graham v. First Nat. Bk. of Norfolk.* 898

## SUMMARY PROCEEDINGS.

1. Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 R. S. 512, § 28, subd. 4, amended by chap. 101, Laws of 1879), which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment debtor, and all who hold under him under pretense of title acquired from him, posterior to the judgment. *People ex rel. Higgins v. McAdam.* 287

2. Accordingly *held*, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors, recovered prior to the appointment of the receiver, the Supreme Court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the Supreme Court the receiver was in effect the person against whom the execution was issued. *Id.*

## SUMMONS.

1. Under the provision of the Code of Civil Procedure (§ 426, sub. 3) which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge; when a sheriff has an office in the city or village where the county courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 R. S. 285, § 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the Code. *Dunford v. Weaver*. 445

2. Under the Code of Civil Procedure (§ 426), to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons, within the State, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient. *Ingersoll v. Mangam*. 622

3. It seems that the provision of the Code of Civil Procedure (§ 451) in reference to the manner of designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition. *Bergen v. Wyckoff*. 659

— Service of, on infants, sufficiency of.  
See *Ingersoll v. Mangam*. 622

## SUPERINTENDENT INSURANCE DEPARTMENT.

See INSURANCE DEPARTMENT.

## SUPPLEMENTARY PROCEEDINGS.

1. It is competent for a person against whom supplementary pro-

ceedings for the collection of a tax have been instituted, *ex parte*, under the statute of 1867 (Chap. 361, Laws of 1867) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted. *Bassett v. Wheeler*. 466

2. Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting, *held*, that the question was not reviewable here. (Code of Civil Procedure § 1387. *Id.*

## SURETIES.

See PRINCIPAL AND SURETY

## SURROGATE'S COURT.

1. An omission in proof of a matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed. *Dunford v. Weaver*. 445
2. Under the provision of the act of 1867 (§ 8, chap. 782, Laws of 1867) in relation to Surrogates' Courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts. *Id.*
3. Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. (3 R. S. 221, § 6, sub. 4.) *Id.*
4. It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed. *Id.*

5. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it, *held*, that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto*. *Id.*

6. The probate of a codicil to a will was contested, both on the ground of want of due execution, and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The General Term, upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate. *Held*, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence. *Dack v. Dack.* 663

— Upon reversal on appeal on the law to General Term from decree of surrogates of county of New York, establishing lost or destroyed will, it is proper to remit proceedings to surrogate, and costs should be awarded against respondent.

*See Sheridan v. Houghton. (Mem.)*  
643

## TAXATION.

*See ASSESSMENT AND TAXATION.*

## TENDER.

1. *It seems* that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received. *Town of Springport v. Teutonia Sogs. Bk.* 403

2. Where, under a contract of sale of personal property, the place of delivery was to be designated by the vendee, *held*, that a tender was not required on the part of the vendor before action to recover the purchase-price; that readiness and

an offer to deliver were sufficient. *Hunter v. Wetseil* 549

## TOWNS.

The act of 1875 (Chap. 49, Laws of 1875) authorizing certain actions to be brought by State was not intended to confer jurisdiction to review by means of an action as therein prescribed the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation or violence. *People v. N. Y. & M. B. R. Co.* 565

## TOWN BONDING.

1. In actions brought to restrain defendants from transferring, and to compel the cancellation of bonds issued by plaintiff under the act of 1869 (Chap. 314, Laws of 1869), authorizing it to subscribe for stock of the C. L. R. R. Co., it appeared that revocations of consents of tax payers of the town, executed and acknowledged with the same formalities as the consents, were delivered to the assessors while they had the consents before them, and before they had acted upon them, and that the residue were insufficient to constitute the majority required by the statute; also that the assessors disregarded the revocations and wrongfully made and filed the statutory affidavit. *Held*, that the omission to file the revocations did not render them ineffectual; that their delivery made them effectual and withdrew from the assessors the authority to make the affidavit. *Town of Springport v. Teutonia Sogs. Bk.* 403

2. Also *held*, that such omission did not estop the plaintiff; that, assuming the tax payers, who signed consents and then revoked them, could be estopped by their acts or omissions, they could not estop the whole body of tax payers. *Id.*

3. Also *held*, that a tender, before the commencement of the action, of

- the stock received for the bonds was not necessary; that defendants could not require a tender to themselves, as they were not received from them and they had no title thereto. If they had any right to them (as to which *quære*), all they could claim was an equitable right of subrogation on canceling their bonds; if the claim was that the stock should have been surrendered to the company or canceled, that was a matter between it and plaintiff, and the rights of the latter as against defendants did not depend upon the prior adjustment of the matter. *Id.*
4. *It seems* that in an action against a third party, whose title depends upon a contract claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received. *Id.*
  5. Also *held*, that the affidavit of the assessors was not conclusive, but only *prima facie* evidence of the facts therein stated. *Id.*
  6. There can be no *bona fide* holder of town bonds, within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority, conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute. *Cogwin v. Town of Hancock.* 532
  7. All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, must see to it that its provisions were complied with; and, in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith does not preclude the town from showing that they were illegally issued. *Id.*
  8. The decisions of the Federal courts holding a contrary doctrine held not to be controlling. *Id.*
  9. Under the provisions of the act of 1866 (§ 2, chap. 398, Laws of 1866) authorizing certain towns to subscribe for the stock of the N. Y. & O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, "shall be proved by affidavit, in writing," of one of certain specified town officers, and declaring that such affidavit, "or a certified copy thereof, shall be evidence of the facts therein contained," the affidavit is not conclusive but only *prima facie* evidence of the facts and may be disputed. *Id.*
  10. Accordingly *held*, in an action to recover the amount due upon certain interest coupons cut from bonds issued by railroad commissioners appointed for defendant under said act, and which had been purchased for value and in good faith, that defendant was not precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the tax payers of the town had not been obtained. *Id.*

## TRIAL.

1. Plaintiff's cattle were transported by defendant from B. to W. A. under a contract which provided, among other things, that in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff should load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle being without food were injured. In an action to recover damages for the injury, it appeared that defendant was requested when the train was stopped, to so place the cars in which the cattle



- were, as to be convenient to the usual and accessible means of unloading; the engine drawing the train was disabled; it appeared, however, that defendant had engines at U., forty-three miles distant; also that other motive power might have been readily obtained. The court, after referring to the evidence on this subject and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance if help could readily have been obtained. *Held*, no error; and that this was so, even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. *Bills v. N. Y., etc., R. R. Co.* 5
2. The engine of the train was disabled by the engineer running it into the water, and there was evidence tending to show negligence on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload was not to be excused by an absence of motive power. *Held*, no error; that defendant could not plead its own previous negligence as an excuse for its inability to perform a distinct and affirmative duty. *Id.*
  3. When the train was at U., and those on board were warned of the high water, plaintiff's agent requested the conductor to place the cars there in a convenient position for unloading; this request was declined. The court was asked but declined to charge that defendant was not liable for such refusal; it charged, however, that if the jury believed the conductor had reason to think he could run the train through without serious detention, defendant would not be liable because of such refusal. *Held*, no error. *Id.*
  4. In an action to recover damages for alleged negligence causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge when crossing it in the night. Defendant had placed gates over the footway on each end of the draw which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. *Hart v. H. R. Bridge Co.* 58
  5. The court charged that if the jury believed that the gate was not entirely closed, but the bottom of it was two and a half feet from the bridge floor, the plaintiff could not recover. *Held*, no error. *Id.*
  6. Upon the question of contributory negligence the court charged: "It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon plaintiff to satisfy you that there was no contributory negligence on the part of the deceased." *Held*, no error. *Id.*
  7. Plaintiff's testator was, by the invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful and willful act. Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar the plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient. *Maisterson v. N. Y. C., etc., R. R. Co.* 247
  8. Where the gravamen of an action

- is fraud, plaintiffs having failed to establish the fraud cannot maintain the action on the theory that a liability founded on contract was disclosed by the evidence. *People v. Dennison*. 272
9. Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue." (Code of Procedure, § 275; Code of Civil Procedure, § 1207.) *Stevens v. Mayor, etc.* 296
10. The plaintiff, therefore, must establish the allegations, and if they warrant legal relief only, he cannot have equitable relief upon the evidence. *Id.*
11. Upon the trial of an action there was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached. *Held*, that there was no exception bringing the error, if any, to the notice of this court. *Devlin v. Cooper*. 410
12. Where a plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal. *Southwick v. First Nat. Bk.* 420
13. In such case the pleadings cannot, after the trial, be conformed to the proof. *Id.*
14. It is no answer to the objection that defendant was probably not misled. *Id.*
15. In March, 1873, T., of the firm of S., T. & Co., doing business at Memphis, drew his draft upon that firm, payable to the order of J. N. M. & Son, a Boston firm. The draft was accepted by the drawees, payable at Memphis in forty days. The holder sent the draft to Memphis for collection. Before it fell due the drawees notified the payees that they would not be able to meet it, and requested permission to draw for the amount. Permission was granted by telegram to draw at sight to pay said draft. S., T. & Co. thereupon drew upon J. N. M. & Son a sight draft for the amount. This draft was discounted by defendant, and with the assent of the drawers the proceeds were placed to their credit, their account with defendant being at that time overdrawn to more than the amount. J. N. M. & Son accepted the new draft on presentation, and subsequently paid it. S., T. & Co. drew a check on defendant to pay the old draft which it refused to honor, and refused to pay said draft when presented. S., T. & Co. soon after became insolvent. In an action to recover the amount of the new draft it was not alleged nor was it proved, that a demand or offer to return the draft was first made, or that defendant had any knowledge of the telegram, or the purpose for which J. N. M. & Son authorized the drawing of the new draft. The court directed a verdict for plaintiff. *Held*, error; that neither a cause of action for a conversion of the draft, nor one to recover back moneys paid by mistake, was established. *Id.*
16. The complaint alleged that defendant was notified of the purpose for which the new draft was authorized to be drawn; that it received it, agreeing to collect and apply the proceeds for that purpose, but that it refused so to do. *Held*, that the court erred in denying a motion for a nonsuit, as plaintiff failed to prove the cause of action alleged in the complaint. *Id.*

17. The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial. *Held*, that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provisions of the Code of Civil Procedure (§ 158) in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. *Dunford v. Weaver*. 445

18. In such an action the fact of the insolvency of the debtor is no defense. *Id.*

19. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed, an exception should be taken. *Muldoon v. Blackwell*. 646

— *Law of another State authorizing an action by the personal representatives of one whose death was caused by negligence, must be proved, it cannot be presumed.*

*See Leonard v. C. S. N. Co.* 48

— *Submission of specific questions to jury, when proper.*

*See Agate v. Morrison. (Mem.)* 672

— *When plaintiff fails to offer evidence on point at issue until after he rests, it is in discretion of court whether to admit it, and its action is not reviewable here.*

*See Agate v. Morrison. (Mem.)* 672

## TRUSTS AND TRUSTEES.

1. The will of K. gave her residuary estate, real and personal, to her executors in trust to receive the rents and profits of the real estate, to invest and keep invested the

personal estate, and to apply such rents and profits and the interest or income of the personality to the use of her husband for life, except that they should apply to the use of the plaintiff, who the will states was brought up by the testatrix, "the sum of \$500 per annum thereout," until he reached the age of twenty-one, after that "the sum of \$1,000 thereout," during the life of her husband, and after that "\$3,000 thereout during his natural life." There was no gift of the remainder. The testatrix had a brother living at the time of making the will, who survived her; at the date of the will, and at the time of the death of the testatrix, the income from the residuary estate was ample to pay the annuities so given to plaintiff and to leave a larger sum for the husband. After the death of the latter the property did not yield enough to keep the real estate in good repair, to pay taxes and incidental expenses, and to pay plaintiff his annuity. In an action asking for a construction of the will and that the deficiency be paid out of the *corpus* of the estate, *held*, that the intention of the testatrix was that the gift to the plaintiff should be paid only from the annual profits of the estate; and that no part of the *corpus* of the estate could be applied to make up the deficiency; also that the trust was to receive and apply the income during the lives of the beneficiaries named and the life of the survivor. *Delaney v. Van Aulen*. 16

2. As to whether plaintiff has the right to have deficiencies in payments made up from increased avails in after years, *quere*. *Id.*

3. S. deposited with defendant, a savings bank, a certain sum of money, receiving a pass-book, which stated that the account was with her, "in trust for Christopher Boone," plaintiff's intestate. S. received the pass-book and drew out one year's interest. After her death defendant paid the amount to her administrator, upon production of his letters of administration and

- of the pass-book. In an action to recover the deposit, *held* that, in the absence of any notice from the beneficiary, the payment was good and effectual to discharge the defendant; that the deposit constituted S. trustee and transferred the title to the fund from her individually to her as such trustee; that, upon the death of S., her rights as trustee to demand and receive the fund devolved upon her administrator, and upon his demand defendant was bound to pay it over; it had no right to inquire into the nature of the trust, and owed no duty to the beneficiary until the latter by notice, by forbidding payment or by demanding it himself, created such right and duty. *Boone v Citizens' Savings Bk.* 83
4. The creator of a trust requiring the investment of money may designate how the investment may be made and what security may be taken, and he may dispense with all security. *Denike v. Harris.* 89
  5. The director of a corporation occupies a fiduciary position, and so is within the rule disempowering one intrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust. *Duncomb v. N. Y. H. & No. R. R. Co.* 190
  6. The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith. *Id.*
  7. But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received. *Id.*
  8. Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt. *Id.*
  9. The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation. *Id.*
  10. The will of I. gave his residuary estate, after the death of his wife, to his son R. in trust, among other things, to apply one-half of the net income to the use and for the maintenance and support of said R., his wife and children during the life of R. R. had at the date of the will and of the death of his mother, which occurred in 1874, a wife and one child (the plaintiff) who was married in 1875, and at and prior to the commencement of this action, was living separate from his father, having a household of his own, and their relations were not amicable. In an action for an accounting, etc., *held*, that the beneficiaries named were not each absolutely entitled to one-third of the net income of the trust estate; that there was a discretion conferred upon the trustee as to its application, but not an uncontrolled discretion; that, under the circumstances of the case, a court of equity had power to direct how the discretion should be exercised; that there being no evidence of a refusal on the part of R. to support plaintiff in his family, or that plaintiff until just before the commencement of the action demanded any portion of the income, or any support or maintenance therefrom, or that he needed any of it for his support, it was to be deemed that he had acquiesced in the manner of its application; and that therefore he was not entitled to any portion of the income accruing prior to the commencement of the action; but that he was entitled to one-third of the net income thereafter. *Ireland v. Ireland.* 821
  11. The wife of R., who was made a defendant, separated from him

- in 1876 on account of improper treatment; in 1877 she commenced an action for divorce from bed and board, and obtained judgment in 1878, with an allowance of \$1,000 annually for alimony. This R. paid, and also paid his wife's board and expenses up to the time of the judgment. *Held*, that she was not entitled to be allowed any thing prior to the commencement of the action, but thereafter was entitled to one-third of the income, deducting, however, therefrom, the amount of the alimony since accruing. *Id.*
12. *It seems* that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments. *Ormidon v. Olcott*. 389.
13. This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception. *Id.*
14. The rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. *Id.*
15. Where, therefore, the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guaranteed by the widow who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, *held*, that it was the right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing. *Id.*
16. The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees. *Id.*
17. Also *held*, that while it was the duty of the surviving executor to foreclose the mortgage in case of non-payment, he was entitled to exercise the reasonable discretion of an ordinarily prudent man as to the time and occasion. *Id.*

SEE ASSIGNMENT (FOR BENEFIT OF CREDITORS).

UNDERTAKING.

1. Where a sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure (§ 188), the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said Code (§ 187), did agree, at defendant's solicitation, to take to plaintiff's attorneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the Code, and in the meanwhile should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed, *held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and

not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that so considered it became operative and binding, though not as a statutory obligation. *Toles v. Ades*, 223.

2. It appeared that the action in which the order of arrest was issued was decided in favor of plaintiff and decision filed in the clerk's office in July, 1868. In September, 1868, the defendant's attorneys served written notice on plaintiff's attorneys to tax costs and enter judgment, but no action was taken until April, 1874, when judgment was entered and after return of a property execution unsatisfied, body execution was issued and returned by the sheriff not found. The defendant has, since 1868, resided out of the State. He returned to the State in 1869, and in 1871, remaining on each occasion several weeks. During his visit in 1871 the executors of the surety in the undertaking made search for it at the clerk's office but it had not then been filed. They then called upon plaintiff's attorney and informed him that the defendant was here and would remain a month, and that they had searched for the undertaking so as to make a surrender; they requested him to enter judgment, issue execution and enforce it, so that the estate might be discharged from liability, they offering to stipulate the costs to prevent delay. This he declined to do. *Held*, that as the undertaking was only enforceable upon the theory that it was an agreement good at common law and not requiring the aid of the statute, the testator stood as surety merely; that he was the jailer of his principal, and the statutory provisions authorizing bail to surrender their principal did not apply; that *laches* was a good defense to the action; and that the evidence required the submission of that question to the jury. *Id.*

#### USURY.

A mortgage on certain premises owned by plaintiff, having been

foreclosed and a sale of the premises being about to take place, under the judgment he agreed with the agent of defendant B., to pay a bonus of ten per cent, for a loan of \$2,000, the judgment to be assigned to B., as collateral security. In pursuance of the agreement said agent gave to plaintiff the \$2,000, which he paid to the holder of the mortgage, who thereupon assigned the judgment to B., and plaintiff paid the bonus agreed upon. B. subsequently caused the premises to be sold under the decree, and they were bid off by defendant G., and judgment entered against plaintiff for a deficiency. G. paid no consideration but acted as agent for B. *Held*, that the transaction with B. was a usurious loan, not a purchase by him of the foreclosure judgment; that the agreement to pay the bonus was part of the contract of loan, not a separate agreement to pay the agent, and so far as appeared was for B.'s benefit; that the contract between the parties being void, the assignment made as security for its performance was also void, and transferred to B. no right to enforce the judgment; and that a judgment setting aside the assignment and all subsequent proceedings under the foreclosure judgment was proper. *Wyeth v. Brantiff*. 627

#### WARRANTS.

— *Of extradition, sufficiency of.*  
*People ex rel. v. Donohue*. 438

#### WILLS.

1. The will of K. gave her residuary estate, real and personal, to her executors in trust to receive the rents and profits of the real estate, to invest and keep invested the personal estate, and to apply such rents and profits and the interest or income of the personality to the use of her husband for life, except that they should apply to the use of the plaintiff who the will states was brought up by the testatrix, "the sum of \$500 per annum thereout," until he reached

the age of twenty-one, after that "the sum of \$1,000 thereout," during the life of her husband, and after that "\$2,000 thereout during his natural life." There was no gift of the remainder. The testatrix had a brother living at the time of making the will, who survived her; at the date of the will, and at the time of the death of the testatrix the income from the residuary estate was ample to pay the annuities so given to plaintiff and to leave a larger sum for the husband. After the death of the latter the property did not yield enough to keep the real estate in good repair, to pay taxes and incidental expenses, and to pay plaintiff his annuity. In an action asking for a construction of the will and that the deficiency be paid out of the *corpus* of the estate, *held*, that the intention of the testatrix was that the gift to the plaintiff should be paid only from the annual profits of the estate; and that no part of the *corpus* of the estate could be applied to make up the deficiency; also that the trust was to receive and apply the income during the lives of the beneficiaries named and the life of the survivor. *Delaney v. Van Aulen*. 16

2. As to whether plaintiff has the right to have deficiencies in payments made up from increased avails in after years, *quære*. *Id.*

8. The old chancery rule construing testamentary gifts of fixed sums by way of annuities payable out of rents and profits, as authorizing the taking of a sufficient sum from the body of the estate to make up a deficiency, stated to have been modified, so that in such cases the intention of the testator is to be ascertained and effect given to it. *Id.*

4. The authorities on the subject collated and discussed. *Id.*

5. D., defendant's testator, prior to his death was a special partner of the defendant R., having contributed \$15,000 to the capital of the copartnership. The will of D. directed his executors to allow R.

"to retain as a loan to him" out of the testator's personal estate, the sum of \$15,000, which was specified as being the amount so invested in the business, "to be used and employed by him in carrying on and conducting the said business," for a term at the option of R., not exceeding three years, upon his paying annual interest at the rate of five per cent, with a further direction to said executors "at the expiration of said time or sooner determination thereof at his option aforesaid" to receive from R. the said sum with interest, and to discharge him fully from all further liability on account or by reason of such indebtedness; and upon such payment the principal was directed to become part of the testator's residuary estate. The testator left a large estate; the defendants as his executors were authorized to sell and dispose of the realty, and to sell and convert into money the personality. In the inventory of the testator's estate filed by the executors, his interest in the partnership was appraised at \$14,000. In an action brought by the residuary legatees to restrain the executors from making the loan to R. unless he gave security, *held*, that it was not the intent of the testator that R. should give security; and that the action was not maintainable. *Denike v. Harrie*. 89

6. The will of T., after directing the payment of his debts and funeral expenses and after giving a series of legacies, gave the residue of his estate, real and personal, to his wife. Then followed this clause: "And I authorize my executors after paying my just debts and funeral expenses to pay over to my wife \$5,000 in cash out of the bequeath to her and before any of the other bequeaths are paid off." The executors were authorized and directed to sell and dispose of all of the real and personal estate, with power to reserve certain parcels of real estate until prices specified could be obtained therefor. In an action to obtain a construction of the will, *held*, that the intent of the testator was to

charge the payment of the legacies upon the real estate; also that the gift to the wife was in lieu of dower. *Le Fevre v. Toole*. 95

7. The will of McC. gave to his executors \$32,000 in trust to invest and pay the interest to "the New York Home for the Blind, of 219 West Fourteenth street, so long as that institution shall maintain and care for William Gordon, now an inmate of that institution," and in case he was so cared for and maintained during his life, at his death the principal was to be paid to said institution; in case it ceased "to exist or to maintain an institution suitable for the care of the blind" during the life of Gordon, then the income was to be paid to any other society who would maintain and care for him which he might select, the principal to be paid to the society maintaining and caring for him at the time of his death. At the time the will was executed Gordon was an inmate of the institution maintained at 219 West Fourteenth street by defendant—the Society for the Relief of the Destitute Blind; but before the death of the testator, Gordon was expelled for violation of the rules of the institution; after such death, however, upon learning of the provisions of the will, the society offered to care for and maintain him in its institution or elsewhere; this he refused; he selected the defendant, The St. Joseph's Home, which has since cared for and maintained him. In an action for a construction of the will, *held*, that the bequest was valid and the said society was entitled to it if willing to conform to the conditions imposed; that the expulsion of Gordon prior to the death of the testator did not affect its right after his death; and, it having offered to perform the condition, was entitled to the legacy, its right not being affected by Gordon's refusal of the offer. *Livingston v. Gordon*. 136

8. Also *held*, that a provision in the judgment directing as to the disposition of the fund in case of failure of or unwillingness on the

part of the society hereafter to care for and support Gordon was unauthorized; that such disposition could only be properly made upon the happening of the contingency. *Id.*

9. The will of W. gave his money and securities remaining after payment of debts, etc., one-half to his son E., one-fourth to his daughter J., and one-fourth to E. in trust, to pay the interest annually to the testator's son W. during life, and after his death the same to be divided equally among his children if he left any him surviving; if he left no child or children him surviving, then the one-fourth was given to E. and J., in equal proportions. *Held*, that E. and J. took an estate in expectancy in the one-fourth held in trust for W. (the son) (1 R. S. 723, § 9), which was alienable. (1 R. S. 725, § 35.) *Ham v. Van Orden*. 257

10. The will of I. gave his residuary estate, after the death of his wife, to his son R. in trust, among other things, to apply one-half of the net income to the use and for the maintenance and support of said R., his wife and children during the life of R. R. had at the date of the will and of the death of his mother, which occurred in 1874, a wife and one child (the plaintiff) who was married in 1875, and at and prior to the commencement of this action, was living separate from his father, having a household of his own, and their relations were not amicable. In an action for an accounting, etc., *held*, that the beneficiaries named were not each absolutely entitled to one-third of the net income of the trust estate; that there was a discretion conferred upon the trustee as to its application, but not an uncontrolled discretion; that, under the circumstances of the case, a court of equity had power to direct how the discretion should be exercised; that there being no evidence of a refusal on the part of R. to support plaintiff in his family, or that plaintiff until just before the commencement of the action demanded any portion of the income, or any



support or maintenance therefrom, or that he needed any of it for his support, it was to be deemed that he had acquiesced in the manner of its application; and that therefore he was not entitled to any portion of the income accruing prior to the commencement of the action; but that he was entitled to one-third of the net income thereafter. *Ireland v. Ireland*. 321

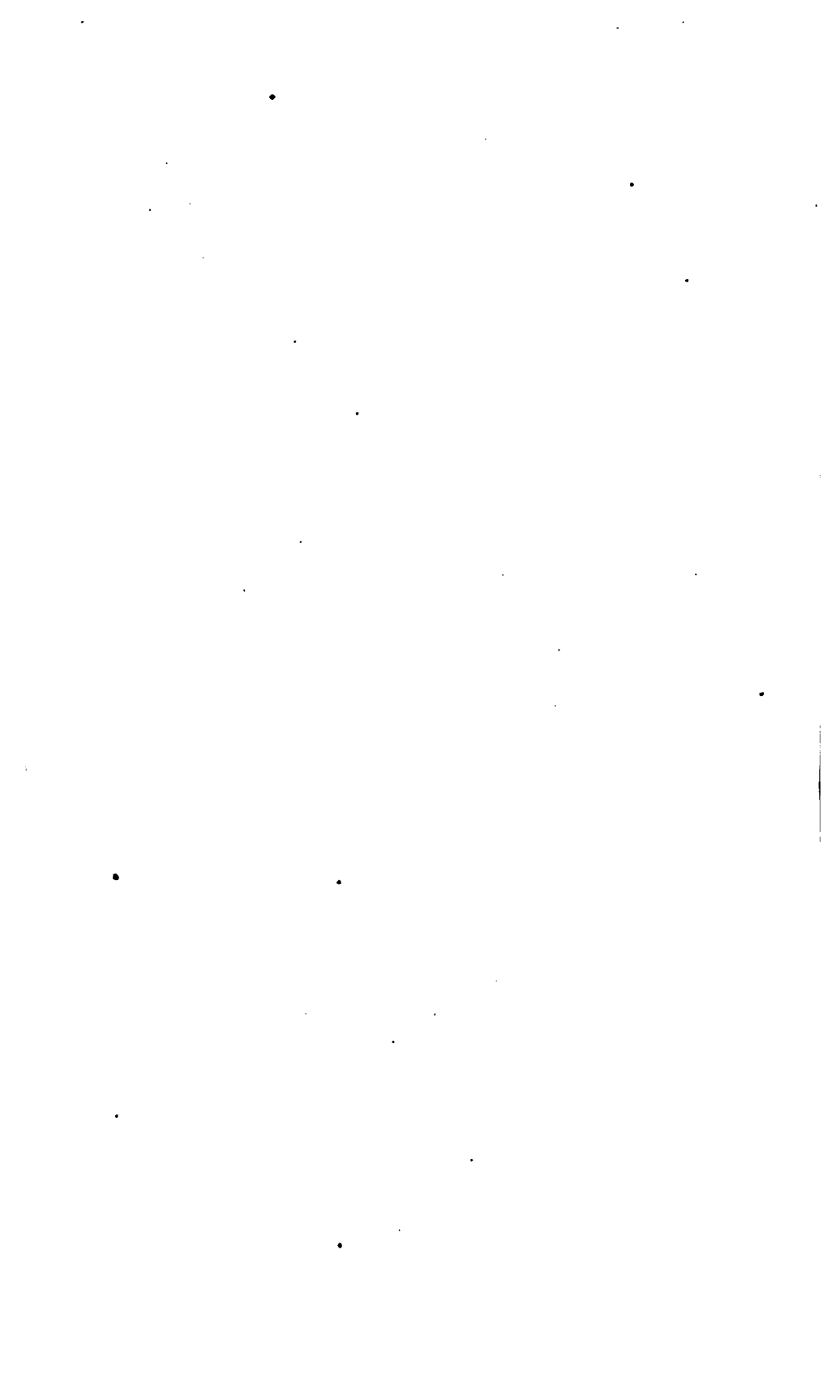
11. The wife of R., who was made a defendant, separated from him in 1876 on account of improper treatment; in 1877 she commenced an action for divorce from bed and board, and obtained judgment in 1878, with an allowance of \$1,000 annually for alimony. This R. paid, and also paid his wife's board and expenses up to the time of the judgment. *Held*, that she was not entitled to be allowed any thing prior to the commencement of the action, but thereafter was entitled to one-third of the income, deducting, however, therefrom the amount of the alimony since accruing. *Id.*

12. The will of H. gave to his executors such portion of his estate as should be necessary to carry out certain specified purposes, among them the following: "To divide the sum of \$20,000 into as many

shares as there shall be lawful issue of my deceased nephew Matthew Horn living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike." At the time of the execution of the will and of the death of the testator, there were living three children of said Horn, and seven grandchildren, two of them children of a deceased daughter. In an action for a construction of the will, *held*, that the provision did not include the grandchildren, either the children of the deceased child or of the living children; and that they took no interest under it. *Palmer v. Horn*. 516

13. To give a cause a preference under the Code of Civil Procedure (§ 791, subd. 5), as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. *Peyser v. Wendt* 642

— *Sufficiency of execution and publication.*  
*See Dack v. Dack.* (Mem.) 663



## ERRATA.

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In *Weaver v. Ely* (83 N. Y. 89), the word "civil," in twelfth line of head-note, should be stricken out; the corresponding section in the Code of Civil Procedure is § 8253.

The name of defendant in case *Union Dime Savings Institution v. Anderson* (83 N. Y. 174), should read "Andariese," instead of Anderson.

In *Bergen v. Urbahn* (83 N. Y. 50), "55 N. Y. 9," in sixteenth line from top of page, should read "55 N. Y. 98."

In *In re Attorney* (83 N. Y. 166), "59 N. Y. 495," in second line from bottom of page, should read "59 N. Y. 595."

In *Sparman v. Klein* (83 N. Y. 250), "69 N. Y. 546," in twelfth line from top of page, should read "69 N. Y. 553."

In *Risley v. Phenix Bank* (83 N. Y. 825), "71 id. 333," in fifth line from top of page, should read "71 id. 325."

In same case, page 837, "8 N. Y. 454," in ninth line from bottom of page should read "8 N. Y. 254."

In Index (83 N. Y. 678), the page of case *Douglas v. Knick. Ins. Co.*, should be "492" instead of "49."

*E. J. E. C.*

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